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# Who "Owns" the Government's Attorney-Client Privilege?

Michael Stokes Paulsen<sup>†</sup>

## INTRODUCTION

An attorney owes a professional duty to his or her client to protect the client's confidences and, as a corollary, to invoke the attorney-client privilege on the client's behalf, where another party uses compulsory legal process to attempt to force the attorney (or client) to disclose such confidences.<sup>1</sup> How does this duty play out where the attorney's client is the federal government? Who controls the decision to assert or waive the

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The reader should be informed that, in April 1998, before the case of *In re Lindsey*, 148 F.3d 1100 (D.C. Cir. 1998) (per curiam), cert. denied, 67 U.S.L.W. 3176 (U.S. Nov. 9, 1998) (No. 98-316), was briefed and argued to the D.C. Circuit, I sent an earlier draft of this article to Independent Counsel Kenneth Starr. (The Independent Counsel's Office had been very helpful in providing my research assistant with copies of the public versions of the briefs and other materials involved in the case *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997), cert. denied, 117 S.Ct. 2482 (1997), and I had known Judge Starr during the time when we both worked in the Department of Justice in the administration of President George Bush, from 1989-1991).

The Independent Counsel's office subsequently advanced the *Garner* corporate-privilege analogy (a major thesis of this article) in its arguments to the D.C. Circuit, though not in the form presented in the April 1998 draft version of this article, and the D.C. Circuit made use of that analogy, see *infra* Part V. (The Independent Counsel's office had not made the *Garner* argument in the Eighth Circuit.) I have not, however, served as counsel or consultant in this matter for any party or amicus. This article does not reflect the position of the Independent Counsel, nor do the views of the Independent Counsel correspond with the position I have taken here.

1. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1995) [hereinafter MODEL RULES]. For purposes of this article, I will treat the Model Rules as the most important "guidepost" of the government lawyer's professional obligations, but with several important caveats, noted at length below. See *infra* note 44.

attorney-client privilege that the United States government, as a distinct legal entity, may have as against other entities or individuals who seek to compel production of material or information that otherwise falls within the bounds of the traditional attorney-client privilege?

My thesis in this article is that the United States government possesses, as a matter of common law, the same attorney-client privilege that exists for a corporation or other organizational entity. That privilege extends to communications made by subordinate officers or employees of the government to the government attorney, for purposes of enabling the attorney to give legal advice to the government, as an organization.<sup>2</sup> It is, however, the *entity*—the United States government—and *not* the individual making the communication, that is the client. Joint representation of the government as an organization and the individual government officer is, and should be, strongly disfavored on conflict-of-interest grounds.<sup>3</sup> Typically, in the corporate context, present management controls the decision whether to invoke or waive the privilege, and the same should hold true with respect to the government's (that is, the execu-

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2. The seminal case delineating the scope of the corporate attorney-client privilege (and, by implication, the scope of the privilege for any type of organizational or "entity" client) is *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

3. See MODEL RULES, *supra* note 1, Rule 1.7(a) (prohibiting representation of directly conflicting interests unless both clients consent and the lawyer reasonably believes that joint representation will not affect the relationship with either client); *id.* Rule 1.7(b) (prohibiting representation of party where representation may be materially limited by duty to another client, or to third person, unless affected client consents and the lawyer reasonably believes the representation will not be affected). But cf. *id.* Rule 1.13(e) (noting the potential for joint representation of both the entity and one or more of its constituents, to the extent consistent with Rule 1.7).

The United States government has adopted regulations providing for separate representation of governmental employees who are subpoenaed, sued, or charged in connection with conduct taken in their capacity as government officers or employees. These regulations recognize that the United States as an entity has an interest in providing for the representation of (at least some) individual officers or employees in such situations, but also that conflicts of interest frequently may arise between the government as an entity and the interests of the individual officer. See 28 C.F.R. § 50.15 (1997); see also, e.g., 13 Op. Off. Legal Counsel 54 (1989); 4B Op. Off. Legal Counsel 749 (1980) (distinguishing between representation of personal interests and governmental interests). The reader should be informed that I was involved in the formulation of the 1989 Office of Legal Counsel opinion and the 1989 version of these regulations, while I was an attorney in the Office of Legal Counsel.

tive's) attorney-client privilege.<sup>4</sup> Under Article II of the Constitution, the President is the Chief Executive Officer of USA, Inc., and thus, ordinarily, controls the privilege.

But the issue becomes more problematic in the context of assertion of the privilege against an Independent Counsel investigating executive branch officials. We live today in a legal and political regime under which one or more Independent Counsel frequently exercise a portion of the control over the law-execution function of the United States government. Since *Morrison v. Olson*<sup>5</sup>—and, arguably, ever since *United States v. Nixon*<sup>6</sup>—the executive branch of the United States government has, from time to time, been subjected to *divided executive management*.

My topic concerns one of the many important practical consequences that flows from this post-*Morrison* constitutional order: how control over the government's attorney-client privilege works under a regime of divided executive management of USA, Inc. The question has spawned contentious disputes in the various Independent Counsel investigations swirling around the administration of President Bill Clinton. The courts' answers to this question to date have had enormous public consequences, including raising the possibility that President Clinton may be impeached or forced to resign from office.<sup>7</sup>

In 1997, the United States Court of Appeals for the Eighth Circuit, in the innocuously-titled but hugely important case of *In re Grand Jury Subpoena Duces Tecum*<sup>8</sup> (denied review under the more provocative, divided-executive caption of *Office of the President v. Office of Independent Counsel*), considered a claim by the Clinton White House of attorney-client privilege against a grand jury subpoena issued in connection with the investigation of Whitewater Independent Counsel Kenneth Starr. The subpoena and the claim of privilege concerned notes taken by attorneys in the Office of Counsel to the Presi-

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4. See *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 358 (1985); *Upjohn*, 449 U.S. 383 (1981).

5. 487 U.S. 654 (1988).

6. 418 U.S. 683 (1974).

7. See David Roger, *Lewinsky Documents to Add New Dimension to Scandal*, WALL ST. J., Sept. 21, 1998, at A30 (describing the increasing number of Americans who favor resignation and the continuing congressional proceedings toward formal impeachment hearings).

8. 112 F.3d 910 (8th Cir. 1997), *cert. denied*, 117 S.Ct. 2482 (1997).

dent (popularly known as "White House Counsel") of meetings with the President's wife, Hillary Rodham Clinton, and her privately-retained personal counsel during breaks at Mrs. Clinton's grand jury testimony concerning the mysterious disappearance and reappearance of Rose Law Firm billing records from the White House residence.<sup>9</sup> The grand jury subpoena also sought White House Counsel notes of conversations with Mrs. Clinton concerning her actions following the suicide of White House Deputy Counsel Vincent Foster in 1993. The White House abandoned an earlier claim of "executive privilege" with respect to the notes.<sup>10</sup> The Eighth Circuit's controversial opinion rejected, by vote of 2-1, the claim of executive branch *attorney-client* privilege as against an Independent Counsel conducting a federal criminal investigation, on the ground that the privilege simply does not exist in such a context.

In 1998, in a dramatic series of events, the D.C. Circuit considered essentially the same issue in a slightly different factual context. *In re Lindsey*<sup>11</sup> initially involved claims by Deputy White House Counsel Bruce Lindsey of both executive privilege and governmental attorney-client privilege as the basis for refusing to answer grand jury inquiries about his conversations with President Bill Clinton and others, concerning President Clinton's possible unlawful conduct, and the White House's responses to legal proceedings investigating such conduct, on a wide range of matters—most notoriously, the possibility that President Clinton committed perjury and obstruc-

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9. These billing records reflected work done by Mrs. Clinton, as an attorney with the Rose Law Firm in Little Rock, Arkansas, in connection with Madison Guaranty Savings and Loan Association, a federally insured savings and loan in Little Rock, operated by James McDougal and Susan McDougal. The McDougals and the Clintons jointly owned the Whitewater Development Company as a real estate venture. See Brief for the Federal Respondent in Opposition at 1-3, *Office of the President v. Office of Independent Counsel*, 117 S.Ct. 2482 (1996) (No. 96-1783).

10. See *In re Grand Jury Subpoena*, 112 F.3d at 914. The record of the case and the briefs of the parties give no indication of why the White House abandoned this argument, but it is likely that the White House lawyers simply believed that its prospects of success, under the analysis of *United States v. Nixon*, were poor. The documents described in the subpoena do not appear to concern executive branch deliberations, let alone deliberations involving the President.

11. 148 F.3d 1100 (D.C. Cir. 1998) (per curiam), cert. denied, 67 U.S.L.W. 3176 (U.S. Nov. 9, 1998) (No. 98-316).

tion of justice in connection with the Paula Jones sexual harassment civil litigation, in which Clinton was a defendant.<sup>12</sup>

In the litigation leading to the *Lindsey* opinion, attorneys for Clinton and the White House initially emphasized a claim of executive privilege, in part because of evident concerns that a claim of attorney-client privilege might not prevail in light of the Eighth Circuit's analysis in *In re Grand Jury Subpoena Duces Tecum*.<sup>13</sup> When both claims were rejected by the district court,<sup>14</sup> President Clinton's lawyers filed a notice of appeal.<sup>15</sup> Independent Counsel Starr, in response, asked the Supreme Court to take the extraordinary step of granting certiorari before judgment, thereby leapfrogging the D.C. Circuit.<sup>16</sup> Clinton's lawyers, in an effort to make the case seem less worthy of such extraordinary and expedited review, served notice that Clinton would drop the claim of executive privilege.<sup>17</sup> The maneuver worked—in part. The Supreme Court denied the writ of certiorari, but noted its expectation that the D.C. Circuit would proceed expeditiously.<sup>18</sup> The D.C. Circuit thereupon ordered expedited briefing and heard and decided the case within two months of the Supreme Court's order denying certiorari before judgment.<sup>19</sup>

Like the Eighth Circuit before it, a divided panel of the D.C. Circuit held that considerations of public policy did not warrant recognition of a governmental attorney-client privilege as against a federal grand jury's criminal inquiry conducted by an Independent Counsel. If anything, the D.C. Circuit's opinion was of even greater doctrinal—and especially political—significance than that of the Eighth Circuit. The D.C. Circuit's decision in *Lindsey*, combined with the decision of another

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12. See Jerry Seper, *Lindsey Provides Long-Awaited Testimony to Grand Jury; White House Tried to Circumvent It by Citing Attorney-Client Privilege*, WASH. TIMES, Aug. 29, 1998, at A4.

13. See *infra* note 60.

14. *In re Grand Jury Proceedings*, 5 F. Supp.2d 21 (D.D.C. 1998).

15. See James Bennet, *Clinton Dismisses Parallels to Nixon Case*, N.Y. TIMES, May 7, 1998, at A20.

16. See Stephen Labathon, *Starr Asks Supreme Court to Speed Process For Ruling on President's Privilege Claims*, N.Y. TIMES, May 29, 1998, at A1.

17. See *infra* note 60.

18. See *United States v. Clinton*, 118 S.Ct. 2079 (1998).

19. See *In re Lindsey*, 148 F.3d 1100 (D.C. Cir. 1998) (per curiam) (issuing opinion on July 27, 1998 after expedited hearings upon the Supreme Court's denial of certiorari on June 4, 1998), *cert. denied*, 67 U.S.L.W. 3176 (U.S. Nov. 9, 1998) (No. 98-316).

panel of the D.C. Circuit just weeks earlier, denying the Clinton administration's claim of a Secret Service "protective functions" testimonial privilege as against a federal criminal investigation and the refusal of Chief Justice Rehnquist to grant a stay in either case, was a contributing proximate cause of Clinton's being forced to acknowledge (in part) having publicly lied for over seven months about the conduct under investigation, and of having (at least) given deceptive testimony in his deposition in the Jones lawsuit.<sup>20</sup> It is no exaggeration to say that the D.C. Circuit's rejection of a governmental attorney-client privilege that would permit Lindsey to refuse to answer questions before a grand jury concerning Lindsey's conversations with President Clinton, was a significant factor in the series of events leading to exposure of presidential misconduct in office—exposure that, as this article goes to press, may to lead to President Clinton's impeachment or resignation.<sup>21</sup>

*In re Grand Jury Subpoena Duces Tecum* and *In re Lindsey* provide useful and important vehicles for considering the question of who controls—who "owns"—the government's attorney-client privilege, both generally and in the special context of an Independent Counsel investigation. The Eighth Circuit's exposition of the privilege, as applied in the government context, appears unsound on several points. The D.C. Circuit's treatment is an improvement, but hits on the crucial point—the lack of presidential supremacy in asserting the executive branch's attorney-client privilege against an Independent Counsel representing the United States government—only glancingly. The D.C. Circuit's judgment, like the Eighth Circuit's, ultimately rests on the debatable policy judgment that the government's attorney-client privilege ought not to apply intra-government, against federal criminal grand jury proceedings, and that the chilling effect of its absence in that context would not have serious detrimental effects on legitimate governmental deliberations involving the need for legal counsel

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20. See Susan Schmidt and Ruth Marcus, *The Legal Gamble: To Say Just Enough; Clinton Relies on a Narrow Definition*, WASH. POST, Aug. 18, 1998, at A1 (noting that Clinton admitted his testimony in the Jones trial was misleading but claimed that it was still "legally accurate"); Office of the President v. Office of the Independent Counsel, App. No. A-108, 1998 WL 438524, at \*1 (U.S. Aug. 4, 1998) (denying stay); *In re Sealed Case*, 146 F.3d 1031 (D.C. Cir. 1998) (denying en banc rehearing).

21. See *supra* note 7 and accompanying text.

(or, at least, would have no more serious detrimental effects than does the absence of *executive* privilege, under *Nixon*.)

Despite weaknesses in analysis, both courts' conclusions are nonetheless correct, not for mere "policy" reasons, but because of the unique situation of federal Independent Counsel investigations in a post-*Morrison* constitutional world. Control of the attorney-client privilege of USA, Inc. is greatly affected by the "corporate" governance structure of USA, Inc., which in turn is a function of the constitutional law of Article II. In a post-*Morrison* world, the issue presented by assertions of "executive attorney-client privilege" as against an Independent Counsel acting within the sphere of his assigned jurisdiction, is analogous to the privilege issue presented when management of a corporation has passed into the hands of a trustee or successor, or when a shareholders' derivative suit makes a threshold showing of "good cause" to believe that management has violated a duty to the corporation.<sup>22</sup> In the former case, control of the corporation—and thus control of the privilege—has passed into the hands of new management, and former management's claims of privilege on behalf of the corporation are without effect.<sup>23</sup> In the latter case, a corporate constituent or beneficiary that has made a sufficient showing of a likely violation by present management of a fiduciary obligation to the corporation, is provided with access to information that would otherwise fall within the corporation's attorney-client privilege, for the limited purposes of the litigation challenging present management's conduct.<sup>24</sup> Application of these doctrines, well-accepted in the corporate context, to the analogous situation of an Independent Counsel investigation of possible federal criminal wrongdoing involving executive branch officials, friends, and intimate associates, yields the conclusion that, in the context of such an investigation, the Independent Counsel, not the President of the United States, controls the decision to invoke or waive the United States government's attorney-client privilege.<sup>25</sup>

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22. See *Lindsey*, 148 F.3d at 1112 (per curiam); *infra* Part IV.

23. See *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348-49 (1985).

24. See *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970). I discuss the *Garner* doctrine at length below. See discussion *infra* Part V.

25. Cf. *Lindsey*, 148 F.3d at 1112 (denying the President the right to invoke the attorney-client privilege). For further discussion, see *infra* Part V.



In what follows, I set forth in greater detail the doctrinal basis for this conclusion, which differs significantly from the analysis of the Eighth Circuit and, in crucial respects, from that of the D.C. Circuit as well. In Part II, I examine the constitutional law that has restructured executive branch governance in the past twenty-five years, and its implications for government lawyering and attorney-client privilege within the executive branch. In Part III, I argue that the Eighth Circuit wrongly analogized governmental attorney-client privilege to executive privilege under *United States v. Nixon*,<sup>26</sup> and wrongly rejected the analogy to the corporate attorney-client privilege recognized by the Supreme Court in *Upjohn Co. v. United States*.<sup>27</sup> For purposes of applying an attorney's duty of confidentiality and the law of attorney-client privilege, the United States of America should be treated as a "corporate" entity (albeit one of a special sort and with a distinctive governance structure). The attorney-client privilege of USA, Inc. should be governed by principles analogous to those applied in any other corporate context.

In Part IV, I examine the variations on this theme developed in the D.C. Circuit's opinion in *In re Lindsey*. While that opinion picks up on the corporate privilege analogy,<sup>28</sup> it does so only in the limited context of discussing how the "chilling effect" of denying the privilege is not materially different in the governmental than in the corporate context, and is thus "similarly acceptable"<sup>29</sup>—a debatable proposition as a policy matter. I argue that the correct analysis of the issue focuses not (as the *Lindsey* majority thought) on whether the *policy* underlying the government's attorney-client privilege applies in the context of a grand jury proceeding, but on the more fundamental question of *who has power* to make or waive such a claim of privilege.

In Part V, I address how the corporate analogy answers the question of who controls the United States Government's decision to assert or waive its attorney-client privilege. As to most matters—and as against all parties outside the executive branch of government—the Article II principles of a unitary executive and of presidential supremacy within the executive

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26. 418 U.S. 683 (1974).

27. 449 U.S. 383 (1980).

28. See *Lindsey*, 148 F.3d at 1112.

29. *Id.*

branch dictate the conclusion that the President of the United States controls the attorney-client privilege of the United States, for as long as the President holds office. But in the context of an Independent Counsel investigation, the President may not assert the privilege against a duly-appointed Independent Counsel representing the United States government in the matter and acting within the sphere of her assigned jurisdiction. The Independent Counsel, not the President, "owns" the executive's attorney-client privilege in such a situation.

## II. NIXON AND MORRISON

Once upon a time, "divided government" meant that Congress and the presidency were controlled by different political parties. It still means that, of course, but now it often means something more: divided management of the executive power of the United States government. The constitutional principles of a unitary executive and of presidential executive supremacy are set forth clearly—one would think unmistakably—in the text of Article II of the Constitution. Article II of the Constitution vests the executive power, in its entirety, in "a President of the United States."<sup>30</sup> As others have argued, both the text and historical evidence of its original meaning and purpose establish that the President must have control over the execution of the laws of the United States, including the power to countermand or displace the decisions of all subordinate executive officers.<sup>31</sup> The framers consciously rejected proposals for a plural

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30. U.S. CONST. art. II, § 1.

31. For a comprehensive treatment of the unitary executive issue, see Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994) (responding in part to the contrary arguments made in Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994)); see also Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62 (1990); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); Lee S. Liberman, *Morrison v. Olson: A Formalist Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313 (1989); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 16 (1993); Saikrishna Bangalore Prakash, Note, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991 (1993).

I have bemoaned the death of the unitary executive elsewhere. See Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous*

executive, and their decision to vest the executive governance of the United States of America in a single official is about as unequivocally set forth in the final text of Article II as it is possible for such things to be. Unfortunately, the principle of presidential executive supremacy within a unitary executive branch was badly wounded in *United States v. Nixon*,<sup>32</sup> was mugged and left for dead in *Morrison v. Olson*,<sup>33</sup> and, as a consequence, probably will not rise again.

In *Nixon*, the Supreme Court implicitly but necessarily rejected the argument that the President speaks finally for the interest of the executive branch with respect to whether executive privilege should limit the information available to an independent special federal prosecutor in a federal criminal proceeding.<sup>34</sup> The Court held, unanimously, under the somewhat misleading rubric of "justiciability," that the President does *not* speak finally for the executive interest in such a situation, at least not where an unrescinded regulation has delegated executive jurisdiction over the matter to the special prosecutor.<sup>35</sup> Rather, a presidential decision as to the executive interest in the matter may be disputed by the special prosecutor, with the dispute resolved by the courts.<sup>36</sup> That, far more than the specific ruling as to the scope and applicability of President Nixon's executive privilege claim in that case, is the more significant holding of the Nixon Tapes case.<sup>37</sup> The President re-

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*Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 85 n.8 (1993); Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Theme of Robert M. Cover's JUSTICE ACCUSED*, 7 J. LAW & RELIGION 33, 85 n.138 (1989). Nonetheless, as noted below, I acknowledge that death for purposes of this article, and pursue its implications for the doctrine of executive attorney-client privilege. See *infra* note 43.

32. 418 U.S. at 694-95 (recognizing that a special prosecutor may contest the President's invocation of executive privilege).

33. 487 U.S. 654 (1987) (vesting any control which the President may have over an independent counsel with the Attorney General).

34. See *Nixon*, 418 U.S. at 692-97.

35. See *id.*

36. See *id.*

37. See William Van Alstyne, *A Political and Constitutional Review of United States v. Nixon*, 22 UCLA L. REV. 116, 130-40 (1974). Professor Van Alstyne's article is prophetic in its identification of the greatest significance of *Nixon* being its potential to "particle-ize" the executive power. *Id.* at 136. In a forthcoming article in the *Minnesota Law Review*, I argue that the most significant holding of *Nixon* is the Court's assertion of (and Nixon's acquiescence to) absolute judicial supremacy over the executive on questions of the respective constitutional powers of the two branches. See Michael Stokes Paulsen, *Nixon Now: The Courts and the Presidency After Twenty-five Years*, 83 MINN.

tained the last-ditch power to prevail over the special prosecutor by rescinding the regulation granting prosecutorial power to the prosecutor; but the political reality was that such rescission probably was impossible for President Nixon by the time the case was decided. The Court's holding, combined with the political precedent it created, effectively established the implicit rule that the President may not countermand the actions of a (nominally) subordinate executive officer except through the blunt and awkward tool of removing him from office.

In *Morrison*, the question of presidential executive supremacy over the independent prosecutor was not even on the table, for the independent counsel provisions of the Ethics in Government Act had essentially institutionalized the insulation of Independent Counsel from presidential direction and control.<sup>38</sup> Moreover, the Act explicitly authorized an Independent Counsel to contest claims of privilege by executive branch officials.<sup>39</sup> The only remaining question was whether the acute limitations placed on the President's ability to remove an Independent Counsel violated Article II. It was the constitutionality of precisely such insulation from presidential appointment, direction, and removal that was the issue in *Morrison*. The Court, by vote of 7-1 (Justice Scalia being the lone dissenter), upheld the constitutionality of the Independent Counsel arrangement in its entirety.

Taken together, *Nixon* and *Morrison* stand for the proposition that the President of the United States is not constitutionally entitled to the final word as to the interest of the executive branch concerning issues arising in a federal criminal prosecution within the jurisdiction of an independent counsel; and that such a limitation on presidential executive supremacy does not violate Article II of the Constitution, as construed by the Supreme Court. The President of the United States no longer speaks definitively and exclusively for the interests of the United States in certain matters of federal criminal law enforcement. Rather, in the context of an Independent Counsel investigation, the Article II "executive power"—the *management* of the United States Government—is divided, uneasily and awkwardly from a constitutional standpoint, between the elected Chief Executive of the United States (CEO) and an in-

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L. REV. (forthcoming May 1999) (symposium on *United States v. Nixon*).

38. See 28 U.S.C. § 596(a)(1) (1994).

39. 28 U.S.C. § 594(a)(5) (1994).

dependent ombudsman/trustee/investigator who possesses her own jurisdiction and who is not accountable to the CEO for her exercise of the executive power within that jurisdiction (except under the narrowest of circumstances).<sup>40</sup> She is subject to the supervision only of the panel of "outside directors" (the special three-judge panel of the D.C. Circuit) who appointed her (once the President, through the Attorney General, acquiesces in the need for an appointment to be made).<sup>41</sup>

This arrangement doubtless constitutes a significant departure from what Justice Scalia, dissenting in *Morrison*, wryly called "our former constitutional system."<sup>42</sup> But for better or worse, that issue is, in all probability, now behind us. While *Nixon* and *Morrison*, taken together, constitute significant departures from the original Article II plan of presidential executive supremacy, that departure must (at least for now) be taken as a given.<sup>43</sup>

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40. See *Morrison v. Olson*, 487 U.S. 654, 663-64 (1988) (discussing 28 U.S.C. § 596(a)(1)-(a)(3) (restrictions on power to remove an Independent Counsel)).

41. See *id.* at 664 (discussing 28 U.S.C. § 596(b)(2)).

42. *Id.* at 715 (Scalia, J., dissenting).

43. The constitutional view of Justice Scalia's dissent in *Morrison* is unlikely to be returned to our constitutional order except through the unilateral decision of the executive branch to refuse to acquiesce to an arrangement it considers unconstitutional (for example, by declining to appoint Independent Counsel pursuant to the statute) or implicitly through major revision or abandonment of the Independent Counsel statute by Congress. I have argued elsewhere that the President is not bound, within the sphere of his executive power, by Supreme Court decisions that he is persuaded are wrong as a matter of faithful interpretation of the Constitution. See Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994). A President who believes that *Morrison* departs from the true interpretation of Article II of the Constitution should—and arguably must, as a matter of constitutional duty—decline to seek the appointment of an Independent Counsel under the provisions of the statute.

The political pressures that invariably exist when appointment of an independent counsel is sought may make that context an especially difficult one in which to press a President's independent constitutional interpretive authority, however, unless such an announced nonacquiescence to *Morrison* occurs *ex ante*, long preceding any specific occasion in which an independent counsel is sought. See Paulsen, *supra* note 37 (arguing that a future President should pursue exactly such a course). Even in such event, a President might feel obliged to appoint, through regulation (as in *Nixon*) an independent counsel with the same authority as would be possessed under the assertedly unconstitutional independent counsel statute. Indeed, the Reagan administration pursued such an approach as a "fallback" with respect to the appointment of Lawrence Walsh to investigate the Iran-Contra affair, in the event that the Independent Counsel provisions of the Ethics in Government

How does this constitutional restructuring of the Article II branch of government affect an executive branch attorney's duties of confidentiality toward his governmental "client"? How does it affect the attorney-client privilege of the United States of America (that is, the executive branch)?<sup>44</sup>

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Act were found unconstitutional in the then-pending litigation that eventually resulted in the decision in *Morrison*. See Howard Kurtz, *Suits Won't Halt Probes, Officials Say; Justice Department Weighs Stand on Independent Counsel Statute; The Crisis of the Reagan Presidency: Aftermath of the Tower Report Series*, WASH. POST, Feb. 28, 1987, at A1.

A regular practice, sustained over time, of appointing independent counsel through the Department of Justice, by special regulation, and of refusing to make such appointments under the Independent Counsel statute, might effectively render *Morrison* a constitutional nullity and vindicate the position taken in Justice Scalia's dissent. Cf. John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, 56 LAW & CONTEMP. PROBS., Autumn 1993, at 292, 310 (discussing a similar strategy by the executive branch with respect to the War Powers Resolution: "By refusing to enforce the law, the President had effectively called Congress's bluff, both raising the stakes and leaving Congress with no feasible way to make its law binding through the use of its own political powers.").

44. As noted above, the ABA's Model Rules of Professional Conduct supply the starting point for analysis of a lawyer's duties of confidentiality with respect to a client (including a governmental client), including the duty to invoke the attorney-client privilege to protect those client confidences covered by the privilege. See *supra* note 1 and accompanying text. However, it is important to note several limitations on the authority and clarity with which the Model Rules speak to a lawyer's professional duties of confidentiality in this context.

First, compliance with professional codes like the Model Rules does not exhaust a lawyer's ethical obligations under the law. See MODEL RULES, *supra* note 1, at 5 (preamble) ("Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law."). Substantive law often imposes important additional, and sometimes conflicting, obligations, which have a superior claim to the lawyer's obedience. Second, lawyers for the United States government are subject to federal law governing their conduct, including regulations prescribed by the Attorney General for the proper conduct of government lawyers. See 28 C.F.R. § 5 (1997) (providing that the Attorney General shall "[s]upervise, and direct the administration and operation of the Department of Justice, including the offices of U.S. Attorney and U.S. Marshals, which are within the Department of Justice). While those regulations typically direct that government lawyers be members of the bar of some state, and adhere to that state's ethics rules, the laws and rules prescribed by Congress and the Attorney General ultimately control the conduct of government attorneys. See 9 Op. Off. Legal Counsel 71 (1985) (indicating that while attorneys may be subject to ethical guidelines of states, the ultimate constraint on them is that imposed by the Department of Justice, as well as federal law). Recent court decisions have challenged this premise, however, holding that state or local bar disciplinary rules are controlling and trump inconsistent regulations promulgated by the Attorney General. See *United States ex rel. O'Keefe v.*

Part of the answer to these questions lies in answering the question of just who is the "client" of a governmental attorney in the first place.<sup>45</sup> In the *In re Grand Jury Subpoena Duces Tecum* case, the Eighth Circuit spoke at length about the issue of whether "The White House" possesses an attorney-client privilege, apparently assuming that "The White House" is a distinct legal entity with the capability of being a "client" with its own attorney-client relationship separate and apart from that of the United States government as a whole, and likewise capable of possessing an attorney-client privilege of its own—

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McDonnell Douglas Corp., 132 F.3d 1252, 1257 (8th Cir. 1998) (finding that Attorney General's regulation authorizing certain ex parte contacts with represented parties was not authorized by statute and thus did not affect application of ethical rule against such contacts). Third, the Model Rules are only models for the states, and even those states that have adopted the Rules (rather than the old "Model Code," which is similar in some, but not all, respects) have introduced important variations, especially with respect to a lawyer's duty of confidentiality. Most of those variations are in the direction of giving the lawyer an increased measure of discretion to reveal client confidences in certain situations (i.e., client fraud in which the lawyer's services were involved, and a client's intention to commit a future crime) or of imposing an affirmative duty on the lawyer to disclose confidential information in some circumstances. But some jurisdictions' rules impose *greater* obligations of confidentiality and *lesser* obligations of candor to the court or to rectify client fraud. Particularly significant in this regard are the Washington, D.C. Rules of Professional Conduct, which include some important provisions at variance with the Model Rules (especially concerning confidentiality and client perjury). D.C. RULES OF PROFESSIONAL CONDUCT (1990) [hereinafter D.C. RULES]. Especially noteworthy is D.C. Rule 1.6(i), which provides, in the context of the duty of confidentiality, that "[t]he client of the government lawyer is the agency that employs the lawyer unless expressly provided to the contrary by appropriate law, regulation, or order." *Id.* For reasons set forth below in the text, I believe that this is inaccurate as a matter of constitutional law. The executive branch attorney's client is the United States government's executive branch. See *infra* notes 51-54 and accompanying text. This conception, not the D.C. Rules' seemingly inconsistent conception, necessarily governs the attorney-client relationship and duties of government attorneys. Unfortunately, the D.C. Rules constitute the governing body of professional rules for many attorneys representing the government, by virtue of the fact of membership in the D.C. Bar (either singly or in combination with another bar membership) and by virtue of the Rules' choice-of-law provision, D.C. RULES, *supra*, Rule 8.5; see also *infra* note 47.

45. My thinking in the following several paragraphs, and to some extent throughout this article, has been very much influenced by Professor Geoffrey P. Miller's fine essay, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1294-99 (1987), which rejects as "incoherent" the notion that the government attorney serves some transcendental "public interest" apart from that legitimately represented by officials within the branch of government within which the lawyer is situated. See also Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291 (1991).

separate and apart from (and therefore, implicitly, assertable against) the United States government as a whole, or some other agency or separable "entity" within it.

Such an implication is badly misleading. Nomenclature matters to clear-headed analysis, especially in identifying exactly who is "the client" of an attorney representing a corporate or other institutional entity in an organizational capacity, or in some other "triangular" legal relationship.<sup>46</sup> The Eighth Circuit's sloppiness on this score affects its whole opinion, and it is worth pausing to get this point right. (The D.C. Circuit, as I explain below, *did* get this point right).

Does an attorney working in the White House Counsel's office represent (a) Bill Clinton, personally; (b) the President of the United States (POTUS); (c) "the White House" (that is, as an agency within the executive branch); (d) the United States of America, or "USA, Inc." (that is, the United States government, as embodied in its executive branch); or (e) "We the People of the United States" in some rarified meta-institutional sense?

The answer that seems most appropriate, as a matter of constitutional law—that is, as a matter of the constitutive law of the legal entity in question—is "(d)": an attorney working for an agency within the executive branch represents the government of the United States of America (that is, the executive branch).

The chief executive *officer* of the entity is the President of the United States, but the attorney plainly does not represent the purely personal, individual interests of the present occupant of the office of President of the United States (so answer "(a)" is clearly wrong). Nor does the attorney represent "the White House" as a legal personage or as an "agency" with a distinctive legal identity in its own right. It is clear, as a matter of constitutional structure, that "the White House" is not an agency or entity separate and apart from the United States government. The "unitary executive" principle continues to hold true as the organizing structure of Article II to the extent not impaired by judicially-validated departures from that

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46. For an analysis of the complexities and realities of such relationships, and the need for care in identifying both the identity of the client and the substantive law governing the client's (and thus often the lawyer's) duties to others, see Professor Hazard's important article, Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 GEO. J. LEGAL ETHICS 15 (1987).



structure in specific instances (like the Independent Counsel), so that an attorney for one agency or division within the Executive Branch ultimately has as his or her client *the Executive Branch of the U.S. government*.

The fact that an attorney's *job responsibilities* may concern only a particular agency does not alter the fact that the attorney's *client* is the United States of America, not the agency, and that it is to that ultimate client that the attorney's duties and obligations run, just as an attorney working within a particular department of a corporation probably (depending on the corporation's charter, bylaws and procedures) has as his or her client the corporation as a whole, and not the department or division that is the focus of the attorney's legal work for the corporation.<sup>47</sup> Thus, a government lawyer in the Treasury Department has, as his or her client, not the Treasury Department or the Secretary of the Treasury, but the executive branch of the United States government—which remains a *unitary* executive, except to the extent altered by *Morrison*. Answer "(c)"—"the White House"—the Eighth Circuit's apparent conception, is thus plainly wrong.<sup>48</sup>

The D.C. Circuit's opinion in *In re Lindsey* avoids the Eighth Circuit's conceptual sloppiness about whom the government attorney represents. From the outset, the D.C. Cir-

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47. To the extent that D.C. Rule 1.6 reflects a different conception—that the agency and not the executive branch as a whole is the government attorney's client—that conception is wrong as a matter of law. See D.C. RULES, *supra* note 44, Rule 1.6(i). The D.C. Rule—which provides that "[t]he client of the government lawyer is the agency that employs the lawyer unless expressly provided to the contrary by appropriate law, regulation, or order"—is perhaps most sensibly construed as necessarily incorporating by reference the constitutional law governing the structure of the executive branch of the United States government. *Id.* While the hierarchical structure of Article II (aside from the exception for an Independent Counsel recognized in *Morrison*) is perhaps not quite an explicit "law, regulation, or order," it must be understood as part of the constitutive law governing the attorney's relationship with his governmental client. Certainly the reverse cannot be the case: The D.C. Rule cannot take precedence over the Constitution's structure of government. Such a reversal of the hierarchy of laws governing the lawyer would have the local bar rule tail wagging the constitutional dog.

48. The use of the Treasury Department as an example is not accidental, for supposed improper contact with Treasury officials concerning a Resolution Trust Corporation (RTC) inquiry is part of what has been alleged to constitute misconduct by executive branch officials in connection with Whitewater. But it should follow from the reasoning in the text that there is nothing on its face improper with White House officials talking with Treasury officials about a matter of executive branch law enforcement.

cuit's opinion notes that posing the question presented properly—may a federal government attorney refuse to answer questions in a federal grand jury investigation concerning possible criminal conduct by federal officials?—leads unavoidably to a negative answer, for the simple reason that “the Office of the President is a part of the federal government, consisting of government employees doing government business.”<sup>49</sup>

That is the key first step. The government lawyer's client is not an individual or a subcomponent office within the government. The client is the United States government—that is, the executive branch. Under Article II of the Constitution, one can almost say that the President *is* the executive branch, making “(b)” —White House Counsel lawyers represent the President of the United States (POTUS)—the least-wrong wrong answer. More precisely, though, the President possesses the *entirety of the constitutional power* of the executive branch under Article II, and thus determines and speaks for the interests of the United States government as an entity (subject, of course, to the exceptions carved out of Article II by the Supreme Court in *Morrison*). In corporate terms, the President is a CEO who is not answerable to a separate Board of Directors, and who serves a term of years by virtue of his election. He is removable only by the process of impeachment, a decision that lies within the province of an entirely separate branch of government that otherwise is constitutionally forbidden from exercising direct control of the executive management of the United States government. By virtue of separation of powers, and the checks and balances that result from the interaction of the independent and shared powers of each branch, Congress possesses important practical and political checks on the President's manner of exercise of the executive power; but Congress cannot itself acquire or subsume the executive power.<sup>50</sup>

It follows from this principle of separation of powers that an executive branch attorney's duty to the United States government as an entity lies to the executive authority of the

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49. *In re Lindsey*, 148 F.3d 1100, 1102 (D.C. Cir. 1998) (per curiam), *cert. denied*, 67 U.S.L.W. 3176 (U.S. Nov. 9, 1998) (No. 98-316).

50. See *Bowsher v. Synar*, 478 U.S. 714, 727 (1986) (holding that Congress cannot control the execution of the laws by assigning executive duties to officer subject to removal by the legislative branch and not by the President). On the independence of Congress's impeachment power, see *Nixon v. United States*, 506 U.S. 224, 229-38 (1993).

United States, not to Congress.<sup>51</sup> Indeed, Congress may often be the "adversary" (in a Madisonian, *Federalist* #51-ish sort of way) of the United States government (understood as the executive authority of the United States). The Article II branch might well have confidentiality interests vis-à-vis the Article I branch, and an executive branch lawyer's duty is to the former, not the latter.<sup>52</sup> In this sense, it is hard to conceptualize the executive branch lawyer's duty as running to some constituency outside of the executive (making "(e)" a wrong answer, too). The President of the United States is the individual constitutionally charged with speaking for the interests of the executive branch of the United States and the government attorney is, in almost all circumstances, bound by the President's determination as to what those interests are, just as subordinate agencies within the executive branch are bound by the President's determinations as to the interests of the executive.

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51. Accord Miller, *supra* note 45, at 1296-99.

52. The President may or may not have a common law *attorney-client* privilege as against Congress, enforceable by the courts. The existence and scope of any privilege, as against Congress, would seem to be a question of the procedures governing congressional hearings and investigations—matters within the constitutional prerogative of Congress on which the authority of courts to articulate "common law" rules would seem dubious at best. The President might well assert a *constitutional* privilege thought to inhere in Article II as a defense to a demand for information by the Article I branch, but these are matters probably best left to the political process of constitutional tug-of-war between Congress and the President envisioned by the framers, rather than resolved by the courts. Cf. Viet D. Dinh, Book Review, 13 CONST. COMM. 346, 354-56 (1996) (reviewing MARK J. ROZELL, *EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY* (1994)). At all events, the *attorney-client* privilege as a privilege distinct from *executive* privilege is not of constitutional dimension.

In *In re Lindsey*, the D.C. Circuit considered President Clinton's argument that Lindsey should not be forced to testify before the grand jury if information from such testimony might thereafter be transmitted to Congress. 148 F.3d 1100, 1112-13 (D.C. Cir. 1998) (per curiam), *cert. denied*, 67 U.S.L.W. 3176 (U.S. Nov. 9, 1998) (No. 98-316). The court breezily remarked that there is no certainty that Lindsey could be prevented from testifying before Congress in any event, and also no certainty as to what rules and procedures would apply in an impeachment proceeding. *See id.* at 1113. The fact of uncertainty, however, is not responsive. If Congress could not compel such testimony because of the existence of a constitutional executive privilege, to permit Congress to obtain such testimony indirectly, by way of a statute requiring the Independent Counsel to file a report with Congress, might well be unconstitutional, even under *Morrison*, as it would effectively transform the Independent Counsel into a functionary of Congress, not the executive. *See Bowsher*, 478 U.S. at 726-27. It is not clear that *Morrison* authorizes the Independent Counsel to waive the executive branch's executive privilege or attorney-client privilege as against Congress.

It is hard, but not impossible, to imagine exceptions: it is possible that, in some circumstances, a lawyer may have an ethical duty (or have discretion) to disclose to persons outside the executive branch the President's breach of a duty to the United States government that is likely to cause substantial injury to the United States, if the highest authority empowered to act on behalf of the organization—that is, the President—persists in a course of conduct “that is clearly a violation of law and is likely to result in substantial injury to the [United States].”<sup>53</sup> But this is not the usual case. Indeed, it is an exception to the rules of confidentiality, applicable where the organizational *client* is controlled by persons who are violating their responsibilities to the client. The fact that a President, for example, might be violating the law does not make *Congress* the executive branch lawyer's client; it means that the duties of loyalty to the client—the executive branch—may in such extraordinary circumstances permit or require disclosure of that information to third parties (such as Congress, among others) notwithstanding the desire of present management of the client (the executive branch) that the information not be disclosed.

But the situation of an Independent Counsel representing the executive branch poses a much different problem, by virtue of the constitutional holdings of *Nixon* and *Morrison* and the fact of the appointment of an Independent Counsel in a particular matter. In a post-*Morrison* constitutional world, a gov-

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53. MODEL RULES, *supra* note 1, Rule 1.13(c); *see also id.* Rule 1.13 (a). Rule 1.13(a) prescribes the proper course of conduct for an attorney representing an organization confronted with misconduct by officers of that organization. It provides that, upon exhaustion of other options, the attorney “may resign in accordance with Rule 1.16.” (emphasis added). Rule 1.16 *requires* an attorney to resign where continued representation would involve the attorney in furthering a course of illegal conduct or otherwise constitute a violation of the rules of professional conduct. *See id.* Rule 1.16 cmt. 2. Comment 16 to Rule 1.6, the confidentiality rule, permits a lawyer withdrawing from a prior representation to “withdraw or disaffirm any opinion, document, affirmation, or the like,” thus effectively permitting a form of stylized semi-disclosure. In addition, Rule 1.6(b)(2)'s authorization of disclosure to establish a defense to a criminal charge or civil claim against the lawyer, based on conduct in which the client was involved, may permit more explicit disclosure of otherwise confidential information when principals of an organizational client have committed conduct the nondisclosure of which might result in further damage to the organization, and consequent liability to the non-disclosing attorney.

It is perhaps instructive that the D.C. Rules of Professional Conduct do not contain Model Rule 1.13(c) or Model Rule 1.13(b). *See* D.C. RULES, *supra* note 44.

ernment attorney's client remains the United States of America (USA, Inc.), but the executive interests of the United States of America are not always subject to the determination and plenary control of the President of the United States. For some purposes, or on some subjects, the Chief Executive does *not* control the exercise of the executive power of the United States government and, indeed, may have little to say about such exercises (absent the extraordinary move of attempted removal of an Independent Counsel or pre-emptive pardons for matters within the Independent Counsel's purview).<sup>54</sup> That is the holding of *Morrison*, with direct reference to federal criminal proceedings conducted by an Independent Counsel.

The constitutional analysis frames the question of who controls the government's attorney-client privilege, but it does not itself answer the question. To say that the President does *not* have exclusive control over the executive power of the United States in an Independent Counsel proceeding is not to say that the Independent Counsel *does* have exclusive control in such matters, and that such control extends to control of the privilege. Such a claim would be too strong, in light of the holding in *United States v. Nixon*.<sup>55</sup> *Nixon* did not hold that the President had *transferred* to the special prosecutor the power to decide whether executive privilege should apply in a particular instance; it held that the special prosecutor, by virtue of the assignment to him of executive prosecutorial power within a prescribed sphere, *could contest* the President's assertion of a privilege (and that such a contest over whose claimed interest better represented the interests of the United States government in this matter was a "justiciable controversy" susceptible of judicial resolution, within the traditional context of a motion to enforce a subpoena). The question framed by *In re Grand Jury Subpoena Duces Tecum* and *In re Lindsey* is similar: who speaks for the interests of the United States in asserting or waiving governmental attorney-client privilege, in the context of a federal grand jury investigation of high executive branch officials conducted by an Independent Counsel?<sup>56</sup>

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54. See *Morrison*, 487 U.S. at 695-96.

55. 418 U.S. 683 (1974).

56. In a provocative *Wall Street Journal* Op-Ed article, former Deputy Assistant Attorney General Douglas R. Cox argued that the Eighth Circuit's opinion in *In re Grand Jury Subpoena Duces Tecum* was right because (according to the title of the article) "Ken Starr, Not Hillary Clinton, is the 'Client' Here," and that "[t]he administration was reduced to the circular ar-

gument that the executive branch can assert the attorney-client privilege against itself." Douglas R. Cox, *Ken Starr, Not Hillary Clinton, Is the "Client" Here*, WALL ST. J., May 7, 1997 at A19. Mr. Cox continues:

For better or for worse, the independent counsel law places a portion of the executive branch's prosecutorial power in the hands of the independent counsel. . . . [F]or the limited purposes of his investigation, the independent counsel exercises the decision-making authority ordinarily exercised by the president. As a result, the independent counsel is the government "client" to whom any government attorney-client privilege belongs, and it is his decision whether to assert any privilege.

*Id.*

With great respect to Mr. Cox (my former superior in the Department of Justice), this analysis is not quite sufficient to warrant his conclusion (with which I ultimately agree). The fact that *prosecutorial power* has been assigned to an Independent Counsel does not necessarily mean that the Independent Counsel has also been assigned the power to waive the government's privilege. If that were true, *Nixon's* complex judicial balancing test and provision for careful in camera inspection for evaluating executive privilege claims would make no sense; Leon Jaworski could waive executive privilege whenever he deemed it appropriate, because (on Mr. Cox's argument) assignment of prosecutorial power gave him plenary power to dispense with the privilege. Similarly, the Independent Counsel law, like the *Nixon* decision, gives the Independent Counsel the authority to "contest" claims of privilege invoked by the President, not to whisk them away. 28 U.S.C. § 594(a)(5) (1994). At least this one provision of the Independent Counsel statute makes sense: one surely would not want to empower an Independent Counsel's desires to trump legitimate executive branch foreign policy or military confidentiality interests, without at least the intervention and in camera review of a judicial tribunal. This was attempted by Independent Counsel Lawrence Walsh in the Iran-Contra investigation, and the Reagan administration's claim of executive privilege ultimately prevailed. *United States v. Fernandez*, 913 F.2d 148, 150 (4th Cir. 1990) (recognizing that the Attorney General, not the Independent Counsel, retains control over the protection of classified information); Appeal of *United States* by the Attorney General, 887 F.2d 465, 467 (4th Cir. 1989) (describing Walsh's attempt to get classified information from former CIA Officer Fernandez); LAWRENCE E. WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS 109-10 (1993); LAWRENCE E. WALSH, FIREWALL: THE IRAN-CONTRA CONSPIRACY AND COVERUP 180 (1997) (describing the agreement between Walsh and the Attorney General in the prosecution against Oliver North to drop counts of the indictment involving classified information as long as the remaining counts could be tried).

Rather, the *Nixon* and *Morrison* decisions, and the Independent Counsel statute, in effect assign *resolution* of privilege disputes between the President and an Independent Counsel to the judiciary. The Independent Counsel is authorized to contest claims of privilege, and the President's executive supremacy to speak finally for the interests of the United States is taken away, but that does not mean that such disputes always must be resolved in favor of the Independent Counsel, as Mr. Cox seems to argue. To reach that conclusion requires a significant additional analytic step not supplied by Mr. Cox's argument. See *infra* Part V (arguing that this step is a justified one).

III. *IN RE GRAND JURY SUBPOENA DUCES TECUM*

The Eighth Circuit's answer to this question was to compare governmental attorney-client privilege to executive privilege under *Nixon*, and to reject the former because *Nixon* rejected the latter, in the context of an Independent Counsel subpoena for evidence relevant to a federal criminal proceeding.<sup>57</sup> Because executive privilege is of constitutional dimension, the court reasoned, and the claim failed in *Nixon*, a non-constitutional common law attorney-client privilege would likewise have to yield.<sup>58</sup> This quasi-"a fortiori" argument exposed the Eighth Circuit majority to the dissent's charge that if *Nixon* was the standard, in camera inspection had to be the procedure, with a specific showing of relevance and need also required.<sup>59</sup>

Both positions are wrong. While *Nixon* is relevant in establishing the constitutional framework within which questions of privilege now must be decided—that is, in its holding implicitly rejecting presidential executive supremacy—executive privilege and attorney-client privilege are simply two different animals. *Nixon*'s holding concerning the scope and strength of the asserted constitutional privilege of the executive does not control the conceptually distinct question of the existence of a common law attorney-client privilege for the United States government as an organizational client. One could coherently hold that there is no such thing as "executive privilege" and yet recognize a common law attorney-client privilege that would cover all or part of the same ground, in practical effect. Conversely, one might conclude that attorney-client privilege affords narrow protection in this context, but that executive privilege should (notwithstanding *Nixon*) provide strong protection.<sup>60</sup>

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57. See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997), cert. denied, 117 S.Ct. 2482 (1997). The D.C. Circuit made a somewhat similar argument in *In re Lindsey*, 148 F.3d 1100, 1113-14 (D.C. Cir. 1998) (per curiam), cert. denied, 67 U.S.L.W. 3176 (U.S. Nov. 9, 1998) (No. 98-316). I address the D.C. Circuit's opinion below. See *infra* Part IV.

58. See *In re Grand Jury Subpoena*, 112 F.3d at 919.

59. See *id.* at 935-36 (Kopf, J., dissenting).

60. Ironically, in *In re Grand Jury Subpoena Duces Tecum*, the Clinton administration early on abandoned any claim of executive privilege with respect to the subpoenaed notes, probably because of the unlikelihood of success in light of the Nixon Tapes case. However, in light of the Eighth Circuit's decision on the scope of attorney-client privilege, the Clinton administration and President Clinton's private attorneys repaired to executive privilege as the

Institutional attorney-client privilege is a distinct claim, having rather little to do with the fact that the particular institution in question is the United States government. (That fact is relevant to the question of the particular "corporate officer" who controls the decision whether to invoke the privilege, but not the question of whether the privilege exists and what it covers.) It is, rather, the corporate analogy of the *Upjohn* case that is the correct one. *Upjohn* involved the claim by a corporation, responding to an IRS summons, to attorney-client privilege with respect to communications made by subordinate officers or employees (including persons outside the management or "control group" of the company) to corporate counsel, at the direction of management, in order to enable corporate counsel to give legal advice to the corporation.<sup>61</sup> The United States Supreme Court recognized the privilege as embracing such communications, and denied enforcement of the IRS summons.<sup>62</sup>

Nothing about *Upjohn* on its face seems to limit its reasoning to corporations, as distinct from other organizational clients, and the White House relied heavily on the *Upjohn* case as supporting its position.<sup>63</sup> The Eighth Circuit purported to distinguish *Upjohn* on three grounds, none of which is particularly persuasive. First, the court observed that *Upjohn*, in recognizing a broad corporate privilege embracing communications not just from senior management to counsel, but by lower echelon officials and employees as well, emphasized the potential for such persons to embroil the entity in legal difficulties.<sup>64</sup>

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privilege d'jour for resisting Independent Counsel Kenneth Starr's grand jury subpoenas for testimony by presidential advisers in the White House Counsel's office. See John M. Broder, *Clinton's Lawyers Seek Broader Ruling on Privilege*, N.Y. TIMES, March 25, 1998, at A21 (discussing the Clinton administration's decision to invoke executive privilege, not governmental attorney-client privilege, as to conversations involving Deputy White House Counsel Bruce Lindsey). But then, in a kind of "double reverse," Clinton's lawyers abandoned the executive privilege claim before the D.C. Circuit in order to avoid the prospect of immediate Supreme Court review, see Peter Blake, *Clinton May Drop Appeal on Privilege; Strategy Could Avert Supreme Court Review*, WASH. POST, June 1, 1998, at A1; *Clinton to Limit Legal Appeal; Executive Privilege Claim to be Dropped*, CHI. TRIB., June 1, 1998, at 1, and went back to the attorney-client privilege claim that had been unsuccessfully pursued in the Eighth Circuit.

61. See *Upjohn Co. v. United States*, 449 U.S. 383, 386-88 (1981).

62. See *id.* at 397.

63. See *In re Grand Jury Subpoena*, 112 F.3d at 919.

64. See *id.* at 920.



Not so for the White House, the Eighth Circuit argued, because "the actions of White House personnel, whatever their capacity, cannot expose the White House as an entity to criminal liability" or to civil liability.<sup>65</sup> Corporate counsel "have a compelling interest in ferreting out any misconduct by employees."<sup>66</sup> But "[t]he White House simply has no such interest with respect to the actions of Mrs. Clinton."<sup>67</sup>

This makes no sense. For starters, the opinion relies upon the awkward and mistaken formulation that it is "the White House" that is the relevant client. The fact that this description of the "entity" also describes a piece of real estate makes the court's argument sound stronger than it really is, for it is of course true that Ken Starr is not looking to indict a building standing at 1600 Pennsylvania Avenue. But if the client is understood as "the United States" it is far from absurd to think of *that* entity as having very broad interests in obtaining information concerning the conduct of its officers and employees. The United States is sued all the time for actions of its officers and employees. The United States has undertaken a legal duty to provide representation in certain circumstances to officers or employees who become embroiled in legal proceedings as a consequence of their governmental employment.<sup>68</sup> It is simply not the case that the United States does not have an interest in the possible misconduct of its officials. Lawyers representing the United States, like any other in-house counsel, need to know of such possible misconduct by officers and employees in order to effectively represent the interest of their client.

It requires an exceedingly narrow view of the potential legal interests of an organizational client to assume that no such interests exist if the organization itself is unlikely to be indicted or charged, and *Upjohn* does not take such a grudging attitude. The reason a broad band of communications to counsel are treated as privileged is because it will enable counsel to give legal advice to the corporation concerning possible courses of conduct to pursue, in light of the information gathered.<sup>69</sup> To be sure, knowing your client could be sued or indicted based on the actions of the client's employees concentrates the mind

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65. *See id.*

66. *Id.*

67. *Id.* at 919-21.

68. *See* 28 C.F.R. § 50.15 (1997).

69. *See Upjohn*, 449 U.S. at 393.

powerfully and might give a special sense of urgency to the legal advice. But that does not exhaust the range of situations in which legal guidance to the entity might be useful. Suppose that employee malefactors have engaged in a course of reprehensible conduct for which there is no reasonable likelihood that the entity will be asked to bear legal responsibility in any way. Information about the conduct might be relevant to legal advice about whether the employee could be fired by the entity on this ground, without risking suit from the chagrined employee. Hillary Clinton would, of course, be a hard person for the United States government to "fire" (especially since she is not actually drawing a salary).<sup>70</sup> But the Eighth Circuit's reasoning is cast broadly, and its conclusion is the broad one that the privilege *does not exist* in the context of a federal criminal investigation. The analysis leading to that conclusion does not persuasively distinguish the policies that animated the *Upjohn* opinion, at least not on the ground that the United States lacks any legal "interest" in its employees' actions that would justify resort to the common law privilege.

Finally, at the time of the communication, it is hard for the government attorney to *know whether* the matter will implicate a legal interest of the United States. As with attorneys representing a corporation, discussed in *Upjohn*, the first task of the government lawyer in such a situation should be to "ascertain[] the factual background and sift[] through the facts with an eye to the legally relevant."<sup>71</sup> This "ascertaining and sifting" function requires communications from representatives of the client, and *Upjohn* held that encouraging such communications warrants according them the protections of the attorney-client privilege.<sup>72</sup> *Upjohn*'s reasoning on this score applies no less to the government attorney than to the corporate attorney.

The Eighth Circuit's second argument against application of *Upjohn* is better, but too narrow: "We also find it significant that executive branch employees, including attorneys, are under a statutory duty to report criminal wrongdoing by other

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70. Others have questioned this point, however. See Robert A. Schapiro & Michael J. Broyde, *Impeachment and Accountability: The Case of the First Lady*, 15 CONST. COMM. 479 (1998); Carl D. Wasserman, Note, *Firing the First Lady: The Role and Accountability of the Presidential Spouse*, 48 VAND. L. REV. 1215 (1995).

71. *Upjohn*, 449 U.S. at 390-91.

72. See *id.* at 397.

employees to the Attorney General.”<sup>73</sup> That is all the court makes of the point. One could fairly argue that the crime-reporting mandate constitutes a statutory abrogation of any common law attorney-client privilege with respect to communications by government employees to government attorneys concerning not only crimes an employee has committed but, more broadly, in the literal words of the statute, “information . . . relating to violations” by employees of federal criminal law. (Indeed, the Independent Counsel, in his brief in opposition to certiorari, rested heavily on exactly such a broader section 535(b) argument.)<sup>74</sup> The Eighth Circuit’s treatment of the statute—as imposing a duty merely to report “criminal wrongdoing”—would only require the White House Counsel’s office to report to the Attorney General Hillary Clinton’s confessions of criminal wrongdoing (or statements that would lead the government attorneys to believe that Mrs. Clinton had engaged in criminal wrongdoing); it would not constitute grounds for any broader waiver of the privilege. Thus, the court’s reliance on section 535(b) does not get it all the way to its conclusion, for the Eighth Circuit’s judgment did not rest on the fact that the notes reflect *incriminating* statements by Hillary Clinton. The court did not look at the notes.<sup>75</sup> Rather, the court held that Ken Starr gets the notes no matter what is in them.<sup>76</sup>

The Eighth Circuit’s treatment of section 535(b) as a helpful policy “push” against application of the privilege in federal grand jury proceedings simply will not do the job. It helps a wee bit, but it does not justify the court’s ultimate conclusion because it does not persuasively distinguish *Upjohn* as a matter of practical policy considerations and common law. A corporation might have a similar internal rule that corporate employees are obliged to report wrongdoing by fellow employees. Indeed, the information gathered by Upjohn’s general counsel, in the *Upjohn* case, was done at the direction of the CEO, car-

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73. *In re Grand Jury Subpoena*, 112 F.3d at 920 (citing 28 U.S.C. § 535(b) (1994)).

74. Brief for the Federal Respondent in Opposition at 11-16, Office of the President v. Office of Independent Counsel, 117 S.Ct. 2482 (1997) (No. 96-1783).

75. *See In re Grand Jury Subpoena*, 112 F.3d at 914.

76. *See id.* at 923-24.

78. *See Upjohn*, 449 U.S. at 386-89.

rying with it the implicit *requirement* that corporate employees comply with the internal investigation.<sup>78</sup> In essence, *Upjohn* had its own in-house version of section 535(b), and that did not affect the Court's decision to recognize the corporation's common law privilege with respect to the communications received. The existence of an in-house duty of employees to provide information to the corporation's counsel, as a condition of the employee's employment, does not render such communications outside the scope of the corporation's attorney-client privilege, under *Upjohn*.

Thus, for section 535(b) to justify a different result from *Upjohn* requires reading the statute far more aggressively—as the Independent Counsel did in his opposition to certiorari<sup>79</sup>—as affirmatively *abrogating* the common law privilege for all communications made by government employees to government lawyers (other than those lawyers appointed to serve as individual counsel for the employee, not as counsel for the government in the matter) that contain any “*information . . . relating to*” violations of criminal law by law enforcement officials. If the statute abrogates the privilege, that is the end of the matter. *Upjohn* is common law, and Congress may prescribe by statute a different rule for communications to government employees.

The difficulty lies in the assertion that 28 U.S.C. § 535(b) really *is* a statutory abrogation of attorney-client privilege. Whether this is so depends a lot on how strong a “clear statement” is thought to be required for statutes departing from the common law.<sup>80</sup> A possible “plain-text” reading is that the reporting duty applies to all government employees, that attorneys are not in terms excepted, and that communications otherwise privileged are not excepted either.<sup>81</sup> But section 535(b)

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79. Brief for the Federal Respondent in Opposition at 23-24, Office of the President v. Office of Independent Counsel, 117 S.Ct. 2482 (1997) (No. 96-1783).

80. The traditional rule is that statutes in derogation of the common law should be strictly construed. Several important Supreme Court cases rely on this notion, directly or implicitly. See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 832-33 (1985); *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35-36 (1983); *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 622-23 (1812); cf. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 521 (1989). For an insightful discussion, treating the traditional canon as of a piece with the canon against statutory repeals-by-implication, see David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 936-37 (1992).

81. The D.C. Circuit in the *Lindsey* case, however, appeared to accept (at

certainly could be read as merely imposing an in-house reporting duty, much like Upjohn's directive to its employees to cooperate in its general counsel's internal investigation. In many ways, that is the more natural understanding of the language chosen in section 535(b), and the reading that better coheres with Congress's subsequent decision to allow the courts to develop the common law of privilege, in Rule 501 of the Federal Rules of Evidence. (Section 535(b) was enacted in 1954; Rule 501 was adopted in 1974.) In context, one would expect that a privilege-abrogating statute would use more specific privilege-abrogating language.

Perhaps the best test of whether section 535(b) establishes an executive branch in-house reporting requirement only, or instead abrogates executive attorney-client privilege, is to ask how the statute most naturally would be understood in the context of a *congressional* subpoena of communications made by executive branch employees to executive branch attorneys for purposes of enabling the Attorney General (and other executive branch attorneys) to advise the executive branch concerning legal matters. If the statute is merely an internal housekeeping matter, whatever attorney-client privilege the executive branch possesses as against Congress would still hold. If the statute is an abrogation of the common law, no such privilege exists (unless the executive branch has a constitutional basis for refusing to provide the requested information). Push the hypothetical a step further: how would section 535(b) be interpreted in the context of a private litigant's discovery demand for such communications in a civil suit against the United States? Would it be construed as effecting a general abrogation or waiver of the executive branch's attorney-client privilege? I have little doubt that the statute would *not* be so construed, as against parties *outside* the executive branch (including Congress). If that intuition is correct, it would seem to follow that section 535(b) is an intra-executive duty imposed on government employees, not a statute that abrogates any common law attorney-client privilege possessed by the executive branch as an entity.

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least for purposes of argument) President Clinton's argument that 28 U.S.C. § 535(b) does not in terms apply to the Office of the President. See *In re Lindsey*, 148 F.3d 1100, 1110-11 (D.C. Cir. 1998) (per curiam), *cert. denied*, 67 U.S.L.W. 3176 (U.S. Nov. 9, 1998) (No. 98-316); *infra* notes 102-04 and accompanying text.

The Eighth Circuit's analysis of the statute discusses none of these difficulties, but consists of nothing more than a passing reference to the statute as support for the argument to which the court next turns—a general public policy interest favoring disclosure in the governmental context.<sup>82</sup> It is in this third and final proposed distinction of *Upjohn* that the Eighth Circuit begins to grope, haltingly, toward a more persuasive rationale for its holding. “[T]he general duty of public service,” the court wrote, “calls upon government employees and agencies to favor disclosure over concealment. The difference between the public interest and the private interest is perhaps, by itself, reason enough to find *Upjohn* unpersuasive in this case.”<sup>83</sup>

Perhaps. But perhaps not: the premise of *Upjohn* is that an organization's attorney-client privilege serves valuable *public* purposes of facilitating “the observance of law and administration of justice” in enabling the attorney to provide sound legal advice to the organization.<sup>84</sup> “The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.”<sup>85</sup> If this reasoning is sound, one would expect that the privilege should be regarded as *especially* important in the governmental context. Nowhere else is the public interest in “observance of law and administration of justice” more critical than in the administration of government. If the privilege facilitates those public purposes (as *Upjohn* maintains), that is not a reason to limit it in the governmental context. If anything, it would be a reason for a court to be more generous in its treatment of the privilege in such a context.

The Eighth Circuit may have had something more precise in mind, however. It quoted the Supreme Court's opinion in *United States v. Arthur Young & Co.*, rejecting work product immunity for accountants and talking about the “public watchdog” function performed by independent accountants.<sup>86</sup> Then, in the most persuasive argument of its opinion, the Eighth Circuit built on *Arthur Young* and drew a comparison with the public responsibilities of government attorneys:

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82. See *In re Grand Jury Subpoena*, 112 F.3d at 920.

83. *Id.*

84. See *Upjohn*, 449 U.S. at 389.

85. *Id.*

86. 465 U.S. 805, 817-18 (1984).

The public responsibilities of the White House are, of course, far greater than those of a private accountant performing a service with public implications. *We believe the strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of a governmental attorney-client privilege applicable in criminal proceedings inquiring into the actions of public officials. We also believe that to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets.*<sup>87</sup>

This passage contains the kernel of truth that makes the result in *In re Grand Jury Subpoena Duces Tecum* correct: the context of a federal criminal investigation of federal officials believed likely to have violated laws of the United States, conducted by a duly-appointed Independent Counsel acting on behalf of the United States, demands some limitation on the power of the officials under investigation to invoke the attorney-client privilege of the United States against investigators and prosecutors of the United States legitimately pursuing a criminal investigation within their assigned jurisdiction.

The Eighth Circuit did not put it quite this way. There is, moreover, much chaff in the opinion that obscures this insight, but the essential point is there. But once the opinion's mistakes and clutter are cleared away, the court's holding can be seen as an embryonic attempt to fashion what I will call a "Government *Garner*" doctrine. But that understanding of the Eighth Circuit's result only makes sense if one embraces, rather than eschews, the analogy to the attorney-client privilege as it exists in the corporate context.<sup>88</sup>

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87. 112 F.3d at 921 (emphasis added) (citation omitted). Interestingly, this point is the only proposition for which the D.C. Circuit in *In re Lindsey* cited the Eighth Circuit's opinion. See *In re Lindsey*, 148 F.3d at 1110.

88. In addition to the points previously noted, the Eighth Circuit erred badly, and unnecessarily, in its discussion of the "common interest" doctrine. That doctrine recognizes that the privilege is not lost by virtue of disclosure of attorney-client communications to, or discussions among, co-parties (and counsel) who possess a common legal interest or objective, or who are litigating against a common adversary. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 126 (Proposed Final Draft No. 1, 1996). The White House argued that the government and Mrs. Clinton possess common interests of such a nature, and that conversations involving Mrs. Clinton, her private attorneys, and government attorneys are covered by this branch of the privilege. See *In re Grand Jury Subpoena*, 112 F.3d at 922-23.

The problem with the argument is that, even if otherwise valid, it does not alter the central question of who controls the privilege. If, in legal effect, Hillary Clinton was speaking to "the United States" when she was speaking to White House Counsel, "the United States" already owns and possesses the

notes made from this meeting. The only question is which official of the United States gets to decide whether the notes will be made available to the grand jury—the Independent Counsel or the President (or his designee). The common interest doctrine would not alter the fact that Hillary Clinton had already voluntarily disclosed this information to the co-party (the United States) with whom she ostensibly shared the common interest. The Eighth Circuit noted as much, drolly observing that the argument “begs the question we are called upon to decide.” *Id.* at 922.

The Eighth Circuit then went on to hold, superfluously and almost absurdly, that there is no commonality of interest between Hillary Clinton and the White House: “Mrs. Clinton’s interest . . . is, naturally, avoiding prosecution . . . . One searches in vain for any interest of the White House which corresponds to Mrs. Clinton’s personal interest. . . . Because . . . the White House and Mrs. Clinton have failed to establish that the interests of the Republic coincide with her personal interests,” the court wrote, the invocation of the common interest doctrine “must fail.” *Id.* at 922-23. The mistake here is in thinking that the common interest doctrine requires complete *congruence* of the two parties’ interests, rather than simply a significant enough *overlap* of interests that the parties think that shared confidences are worth the risk. One need not believe that “what’s good for Hillary is good for the country” to recognize that the United States government (the relevant co-party) may have significant legal interests in common with the personal interests of the spouse of the present President of the United States, arising out of conduct occurring in the White House and potentially involving government personnel. For that matter, the premise behind the government’s provision of representation, in some circumstances and under certain conditions, to employees who are sued, subpoenaed, or charged for conduct in connection with their government employment, is that the government may have interests in common with such employees. At the same time, the government may have interests *in opposition* to those of the employee, which is why representation of the employee generally is provided by counsel *not* representing the United States, and why representation or reimbursement may ultimately be denied in some instances. See 28 C.F.R. § 50.15 (1997); 13 Op. Off. Legal Counsel 54 (1989). Surely, whatever interest could in theory justify the government in paying for an officer’s or employee’s private legal representation would similarly support application of the “common interest” doctrine. The problem for Hillary Clinton here is that her co-party, upon hearing her statements, decided it might wish to use those statements against her, and no binding agreement with the United States (in the person of the official with final decisionmaking authority on this question, Kenneth Starr) existed to prevent them from doing so.

On one point the Eighth Circuit was clearly right. The last section of the court’s opinion analyzing the privilege claim rightly rejects the outrageous argument (incredibly, accepted by the district court) that Mrs. Clinton’s asserted “reasonable belief” that the communications would be privileged somehow makes them privileged. See *In re Grand Jury Proceedings*, 112 F.3d at 923. The Eighth Circuit noted that the cases relied on by the White House all involved “reasonable mistakes of fact” and that Hillary Clinton’s argument was essentially “that a client’s beliefs, subjective or objective, about the law of privilege can transform an otherwise unprivileged conversation into a privileged one.” *Id.* To state the proposition is to refute it. The Eighth Circuit correctly stated the proposition.



IV. *IN RE LINDSEY*

Presented with essentially the same issue, the D.C. Circuit in *In re Lindsey* embraced the *Upjohn* corporate privilege analogy in the course of rejecting President Clinton's claim of governmental attorney-client privilege with respect to his conversations with his Deputy White House Counsel (and long-time confidant) Bruce Lindsey.<sup>89</sup> The D.C. Circuit's opinion, however, addressed the corporate analogy only obliquely, as part of its policy balancing of the costs and benefits of recognizing the privilege in the context of a federal criminal investigation of federal officials, not as a point central to the analysis.<sup>90</sup> The D.C. Circuit's opinion, while avoiding some of the problems with the Eighth Circuit's analysis, likewise focused primarily on whether "reason and experience"—that is, policy—support recognition of the common law attorney-client privilege in this distinctive context.<sup>91</sup>

The stakes were arguably higher in *In re Lindsey* than in the Hillary Clinton case. The conversations for which the Independent Counsel sought the testimony of Bruce Lindsey included communications by the President of the United States to an attorney in the White House Counsel's office acting (at least as to some of these conversations) in his capacity as a government attorney,<sup>92</sup> for purposes of obtaining legal advice concerning conduct in which the President engaged while in office (possible perjury and obstruction of justice) and discussing what actions might be taken by the President in light of these legal difficulties, all of which could have serious consequences for the United States government (including possible im-

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89. *In re Lindsey*, 148 F.3d 1100, 1111-14 (D.C. Cir. 1998) (per curiam), cert. denied, 67 U.S.L.W. 3176 (U.S. Nov. 9, 1998) (No. 98-316).

90. See *id.*

91. See *id.* at 1104, 1108 (referencing Federal Rules of Evidence 501's standard that courts should interpret privileges "in light of reason and experience").

92. The court noted that several of the conversations on which Bruce Lindsey invoked attorney-client privilege did not involve Lindsey acting in his capacity as an attorney, but concerned political or policy issues only, or involved legal advice given to President Clinton in a purely personal capacity (concerning the Paula Jones lawsuit) and thus did not fall within Wigmore's traditional description of the privilege. See *id.* at 1106. Nonetheless, the court stated that "[w]e have little doubt that at least one of Lindsey's conversations subject to grand jury questioning 'concerned the seeking of legal advice' and was between President Clinton and Lindsey or between others in the White House and Lindsey while Lindsey was 'acting in his professional capacity' as an attorney." *Id.* at 1107.

peachment of the President). Assuming *arguendo* that the communications concerned requests for legitimate legal advice and would not fall within the crime-fraud exception for communications made for the purpose of facilitating ongoing or future criminal activity (a matter on which the facts are not publicly known as of the time this article goes to print), the communications at issue would seem to fall within the very core of executive attorney-client privilege. The proper question, however, is not whether the privilege exists, but who *controls* its assertion or waiver.

That is not the way the D.C. Circuit majority framed the issue. Like the Eighth Circuit, the D.C. Circuit in *In re Lindsey* conceived of the question as whether government attorney-client privilege should *exist* in the first place, in this particular context.<sup>93</sup> The difference is subtle, but potentially important, for while the D.C. Circuit's ultimate conclusion is sound, to the extent its holding rests on questions of policy and judgment rather than on the executive branch governance structure that exists as a matter of law in a post-*Morrison* constitutional world, the holding is vulnerable. Reasonable minds can differ as to the policy question of whether government officials *should* possess an attorney-client privilege covering communications to government lawyers for purposes of obtaining (presumably) legitimate legal advice, as against a federal grand jury inquiry. But the question of *control* over the privilege—the power to waive or override it—is a question not of judgment but of analysis and application of the corporate by-laws and statutes of USA, Inc., to ascertain how the lines of authority are drawn concerning this matter.

The D.C. Circuit, like the Eighth, started with an analogy to *United States v. Nixon*.<sup>94</sup> President Nixon lost his claim for executive privilege as against a specific subpoena for evidence in a federal criminal proceeding brought by an independent prosecutor on behalf of the United States, so why should President Clinton's claim of executive attorney-client privilege in

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93. See *id.* at 1102 (“[N]either legal authority nor policy nor experience suggests that a federal government entity can maintain the ordinary common law attorney-client privilege to withhold information relating to a federal criminal offense.”); *id.* at 1108 (stating the question as “whether, in the first instance, the privilege extends as far as the Office of the President would like,” and stating the court’s task in terms of Rule 501 of the Federal Rules of Evidence as one of interpreting privileges in light of reason and experience).

94. See *id.* at 1102 (citing *Nixon*).

the same type of context receive more respect? "[T]here is no basis for treating legal advice differently from any other advice the Office of the President receives in performing its constitutional functions," wrote the D.C. Circuit in *In re Lindsey*.<sup>95</sup>

A President often has private conversations with his Vice President or his Cabinet Secretaries or other members of the Administration who are not lawyers or who are lawyers, but are not providing legal services. The advice these officials give the President is of vital importance to the security and prosperity of the nation, and to the President's discharge of his constitutional difficulties. Yet upon a proper showing, such conversations must be revealed in federal criminal proceedings.<sup>96</sup>

The court continued with a particularly effective barb:

Only a certain conceit among those admitted to the bar could explain why legal advice should be on a higher plane than advice about policy, or politics, or why a President's conversation with the most junior lawyer in the White House Counsel's Office is deserving of more protection from disclosure in a grand jury investigation than a President's discussions with his Vice President or a Cabinet Secretary. In short, we do not believe that lawyers are more important to the operation of government than all other officials, or that the advice lawyers render is more crucial to the functioning of the Presidency than the advice coming from all other quarters.<sup>97</sup>

It's hard to argue with that—at least not without appearing to be a conceited lawyer. Judge Tatel, dissenting, *did* argue with the majority on this point, however, and his argument is not without persuasive force. The attorney-client privilege, Judge Tatel wrote, "rests not, as my colleagues put it, on some 'conceit' that 'lawyers are more important to the operations of government than all other officials' . . . but rather *on the special nature of legal advice*, and its special need for confidentiality, as recognized by centuries of common law."<sup>98</sup> Citing *Upjohn*, Judge Tatel argued that the purpose of the privilege is to "enable[ ] the lawyer as an officer of the court properly to advise the client, including facilitating compliance with the law."<sup>99</sup>

President Clinton's subsequent public admissions invite the cynical response that, in this case at least, the attorney-client privilege appears to have been a device for obstructing

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95. *Id.*

96. *Id.* at 1114 (citations omitted).

97. *Id.*

98. *Id.* at 1120 (Tatel, J., dissenting in part and concurring in part) (emphasis added).

99. *Id.*

access to evidence of probable crimes, not "facilitating compliance with the law."<sup>100</sup> In terms of the law as set forth in *Upjohn*, however, Judge Tatel was right. The theory of the attorney-client privilege is that complete confidentiality will induce candor which will produce competent counsel which will induce compliance with law. While one can disagree with that theory (and there is plenty of anecdotal evidence that poor legal "ethics" justifies some cynicism about this ideal chain-of-causation), the theory rests not on a claim that lawyers' advice is more important than anybody else's, but that it is *different*. Because persons seeking legal advice often have very real legal problems, resulting from their own questionable conduct, the occasions that call for such advice are perhaps less likely than most other situations (maybe even including Cabinet meetings) to produce complete candor by the person needing advice and the person giving it, if confidentiality cannot be assured.

Moreover, even if one does not accept that legal advice calls for greater protection of confidentiality than advice to the President on matters of national policy or politics, it might as easily be concluded that *Nixon* was too miserly in its protection of executive branch deliberative privilege, not that the attorney-client privilege is too generous. While it would seem absurd to say that the outcome in *Nixon* could be circumvented simply by making all executive branch advisers lawyers in the Office of Counsel to the President, it seems too much a debater's point to say that attorney-client privilege should be given a narrow reading because executive privilege already has. The law has endured worse anomalies.<sup>101</sup>

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100. In light of President Clinton's partial public admissions and his grand jury testimony, it may be the case that sufficient evidence exists to bring his communications with Lindsey within the "crime-fraud" exception to the attorney-client privilege in any event. See *United States v. Zolin*, 491 U.S. 554 (1989); *United States v. Hodge & Zweig*, 548 F.2d 1347 (9th Cir. 1977). If so, the specific information supporting such a claim is not now publicly known. Moreover, a potentially insurmountable barrier exists to showing the crime-fraud exception in this context. If the privilege at issue is the *government's* attorney-client privilege, the *United States government* has not sought counsel for purposes of furthering a crime, the governmental officer has. See *In re Sealed Case*, 107 F.3d 46, 50 (D.C. Cir. 1997); see also *infra* Part V.

In any event, establishing grounds for invoking the crime-fraud exception to the privilege is far more difficult as a general proposition than, in a case such as this one, simply to prevail on the argument that as a matter of law the privilege either does not exist or cannot overcome a grand jury subpoena in a federal criminal investigation.

101. See also *supra* text accompanying notes 55-60 (discussing *Nixon*). As I argue elsewhere, the correct answer is that *Nixon* was wrong on the scope of

The D.C. Circuit's more persuasive analysis centered on the statutory role of the Independent Counsel and the statutory policy of 28 U.S.C. § 535(b). "[T]he Independent Counsel is by statute an officer of the executive branch representing the United States," the court wrote. "For matters within his jurisdiction, the Independent Counsel acts in the role of the Attorney General as the country's chief law enforcement officer."<sup>102</sup>

The court was referring to the *statutory* responsibilities of the Attorney General. As a constitutional matter, of course, *the President* is the nation's chief law enforcement officer. But the court's essential point was correct: when one office of the executive branch (the "Office of the President") resists a subpoena from another, analysis of whether a privilege exists "should take account of the complex considerations of governmental structure, tradition, and regulation that are involved."<sup>103</sup> Though the court did not say so explicitly, the reality of governmental structure here is that the Independent Counsel statute *does* make the Independent Counsel the nation's chief law enforcement officer in the matters within his jurisdiction, that such authority constitutionally may displace the President's unless and until the Independent Counsel's authority is terminated (*Nixon, Morrison*), and that the Independent Counsel has full authority to contest the President's (or any other officer's) claim of testimonial or evidentiary privilege.<sup>104</sup>

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executive privilege, and that the correct formulation of the scope of that privilege should be very much parallel to that accorded the traditional common law attorney-client privilege. See Paulsen, *supra* note 37.

102. *In re Lindsey*, 148 F.3d at 1107 (citing 28 U.S.C. § 594(a) (1994)).

103. *Id.* (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 124 cmt. B (Proposed Final Draft No. 1, 1996)).

104. Independent Counsel Starr subpoenaed President Clinton to testify before the grand jury. Rather than resist the subpoena, Clinton agreed to testify before the grand jury because he had "nothing to hide" and Starr agreed to withdraw the subpoena. See Peter Baker & Susan Schmidt, *Clinton Agrees to Testify for Grand Jury*, WASH. POST, July 31, 1998, at A1. In light of Clinton's subsequent refusal to answer certain questions, it is possible that Starr could again issue a subpoena to the President. Press reports reflected discussion of whether the President constitutionally can be compelled to testify before a federal grand jury. If *Nixon* is the law, the question is not difficult: the President is fully amenable to judicial process, upon a sufficient showing of justification. Physical evidence and testimonial evidence would appear to stand on no different ground in this regard. See also *Clinton v. Jones*, 520 U.S. 581 (1997) (unanimously holding that the President enjoys no constitutional privilege or immunity against being required to appear and defend a civil lawsuit in which he is a defendant while he is serving as President).

If the Independent Counsel is the nation's chief law enforcement officer, the Deputy White House Counsel is, in a sense, his subordinate. That would seem almost to settle the matter. The *In re Lindsey* opinion then took a rather different turn, however, noting the absence of controlling precedent, and proceeding to treat the question as one of balancing various policy considerations—of which the authority of the Independent Counsel as the chief law enforcement official of the United States was but one. The core of the D.C. Circuit's holding can be found in one important paragraph, blending considerations of constitutional structure and legal ethics:

When an executive branch attorney is called before a federal grand jury to give evidence about alleged crimes within the executive branch, reason and experience, duty, and tradition dictate the attorney shall provide the evidence. With respect to investigations of federal criminal offenses, and especially offenses committed by those in government, government attorneys stand in a far different position from members of the private bar. Their duty is not to defend clients against criminal charges and it is not to protect wrongdoers from public exposure. The constitutional responsibility of the President, and all members of the Executive Branch, is to "take Care that the Laws be faithfully executed." Investigation and prosecution of federal crimes is one of the most important and essential functions within that constitutional responsibility. Each of our Presidents has, in the words of the Constitution, sworn that he "will faithfully execute the Office of President of the United States, and will to the best of [his] Ability, preserve, protect and defend the Constitution of the United States." And for more than two hundred years, each officer of the Executive Branch has been bound by oath or affirmation to do the same. This is a solemn undertaking, a binding of the person to the cause of constitutional government, an expression of the individual's allegiance to the principles embodied in that document. Unlike a private practitioner, the loyalties of a government lawyer therefore cannot and must not lie solely with his or her client agency.<sup>105</sup>

Given the timing and circumstances of the opinion—July 27, 1998, following denial of the Clinton administration's claims of a Secret Service privilege by another panel of the D.C. Circuit,<sup>106</sup> unanimous denial of rehearing en banc and denial of a stay by Chief Justice Rehnquist,<sup>107</sup> and in the face of mounting public evidence of the falsity of President Clinton's prior public statements concerning his sexual encounters with Mon-

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105. *In re Lindsey*, 148 F.3d at 1108 (citations omitted).

106. See *In re Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998), cert. denied, 67 U.S.L.W. 3422 (U.S. Nov. 9, 1998) (No. 98-93).

107. See *Office of the President v. Office of the Independent Counsel*, App. No. A-108, 1998 WL 438524, at \*1 (U.S. Aug. 4, 1998) (denying stay); *In re Sealed Case*, 146 F.3d 1031 (D.C. Cir. 1998) (denying en banc rehearing).

ica Lewinsky and his half-year long effort to thwart the Independent Counsel's investigation into whether Clinton lied about this matter under oath in a federal court proceeding—one cannot help but read the D.C. Circuit's language here as a pointed civics lesson to the President and to his administration colleagues, especially lawyers: the government lawyer's duty is to the United States government, its Constitution, and its laws, *not* to individual officers of that government who violate the law and attempt to deploy government lawyers to assist in evading detection of such violations. "This view of the proper allegiance of the government lawyer is complemented by the public's interest in uncovering illegality among its elected and appointed officials."<sup>108</sup>

The point could not have been more clear: Deputy White House Counsel Bruce Lindsey had an ethical duty and public responsibility to the United States to disclose information concerning possible federal criminal conduct by government officials, including the President, when that information came to him in his role as an attorney representing the United States government.<sup>109</sup> Such a duty made it *improper* for him to comply with the President's desire that he assert attorney-client privilege as against a federal grand jury investigation conducted by an independent counsel. And, by implication, the existence of such a duty helped make clear to the court that "reason and experience, duty, and tradition" counseled against recognition of the asserted privilege in such circumstances.

The point is only fully persuasive on the issue presented, however, if that issue is framed as *who controls* the assertion of privilege: may the Office of the President invoke governmental attorney-client privilege against the highest law enforcement official of the United States government? It is less persuasive if the question is whether a governmental privilege *exists* that covers the communication in question. As with section 535, the existence of an in-house reporting duty to the General Counsel

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108. *In re Lindsey*, 148 F.3d at 1109; see also *id.* (noting that "before an attorney in the Justice Department can step into the shoes of private counsel to represent a federal employee sued in his or her individual capacity, the Attorney General must determine whether the representation would be in the interest of the United States").

109. For a general discussion of the problem of government attorneys' possible complicity in unlawful conduct by officials in the Clinton administration, see Michael Stokes Paulsen, *Hell, Handbaskets, and Government Lawyers: The Duty of Loyalty and its Limits*, 61 LAW & CONTEMP. PROBLEMS (forthcoming November 1998).

for USA, Inc. does not constitute an abrogation of USA, Inc.'s "corporate" attorney-client privilege as against everybody. The ethical duty of executive branch officers under Article II of the Constitution is to the Article II branch of government, not to Congress or the public.<sup>110</sup> The factor that is most crucial to overcoming the privilege, therefore, is not the existence of ethical duties on the part of government lawyers, but the fact that that ethical duty is owed to the *Independent Counsel, as the highest law enforcement authority of the United States*. The D.C. Circuit mentions both "factors," but does not clearly connect them.

The rest of the *In re Lindsey* opinion is almost anticlimactic. The D.C. Circuit, like the Eighth Circuit, considered 28 U.S.C. § 535, the statute imposing a duty to inform the Attorney General of possible criminal law violations by federal officials, to be relevant in terms of showing a general policy favoring disclosure. (Indeed, the D.C. Circuit suggested that the statute "does not clearly apply to the Office of the President" at all, since that Office is technically neither a "department" nor an "agency.")<sup>111</sup>

The court then proceeded to weigh the public interest in disclosure against the need for confidentiality in government officials' conversations with government lawyers, assuming for the sake of argument that its holding would "chill some communications" but noting that these same fears were discounted in the Nixon Tapes case.<sup>112</sup> It was at this point that the court, for the first time and almost as an afterthought, made a passing reference to implied waiver of the privilege in certain intra-corporate litigation, as presenting analogous situations where confidentiality is not absolute:

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110. See Miller, *supra* note 45, at 1296. The D.C. Circuit in *In re Lindsey* appeared to recognize as much, quoting with approval from Federal Bar Association Ethics Committee, *The Government Client and Confidentiality: Opinion 73-1*, 32 FED. B.J. 71, 72 (1973):

Each part of the government has the obligation of carrying out, in the public interest, its assigned responsibility in a manner consistent with the Constitution, and the applicable laws and regulations. . . . [We do not suggest, however, that the public is the client [of the government lawyer] as the client concept is usually understood. It is to say that the lawyer's employment requires him to observe in the performance of his professional responsibility the public interest sought to be served by the governmental organization of which he is a part.

*In re Lindsey*, 148 F.3d at 1109.

111. *In re Lindsey*, 148 F.3d at 1110.

112. *Id.* at 1111.



Because both the Deputy White House Counsel and the Independent Counsel occupy positions within the federal government, their situation is somewhat comparable to that of corporate officers who seek to keep their communications with company attorneys confidential from each other and from the shareholders. Under the widely followed doctrine announced in *Garner v. Wolfenbarger*, corporate officers are not always entitled to assert such privileges against interests within the corporation, and accordingly must consult with company attorneys aware that their communications may not be kept confidential from shareholders in litigation. Any chill on candid communications with government counsel flowing from our decision not to extend an absolute attorney-client privilege to the grand jury context is both comparable and similarly acceptable.<sup>113</sup>

This is a long way from the Eighth Circuit's rejection of the analogy to the attorney-client privilege as it exists in the corporate context. But what the D.C. Circuit treats as an afterthought is actually the central point: an Independent Counsel investigation of possible criminal misconduct by executive branch officials is almost perfectly analogous to a derivative suit brought by stockholders asserting management misconduct or breach of a duty to the corporation. And the question of whether an Independent Counsel is entitled to demand the grand jury testimony of government lawyers concerning their conversations with government officials about matters that subsequently have come under the Independent Counsel's investigatory jurisdiction is almost exactly the same as the question of whether stockholders bringing a derivative suit should, upon a sufficient showing of colorable merit, be entitled to access to otherwise-privileged communications to corporate counsel by defendant members of present management—the issue addressed by the *Garner* doctrine. The D.C. Circuit's opinion is a step in the direction of a better approach to problems of this sort—what I call a “Government *Garner*” doctrine.

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113. *Id.* at 1112 (internal citation omitted).

## V. INDEPENDENT COUNSEL PROCEEDINGS AND "GOVERNMENT GARNER"

Under *Upjohn*, the attorney-client privilege of a corporation extends not only to communications between corporate officers and corporate counsel for purposes of obtaining legal advice for the corporation, but also to communications from lower echelon employees to counsel for the corporation made for such purpose, concerning matters within the scope of the employee's duties for the entity.<sup>114</sup> Clearly, communications from President Clinton, as CEO of USA, Inc., to legal counsel for the United States (be it White House Counsel, the Attorney General, or another government lawyer), are covered by the *Upjohn* formulation. Although Hillary Clinton is technically neither an "officer" nor an "employee" of the executive branch (at least not for all purposes),<sup>115</sup> as a factual matter she probably has the type of quasi-agency relationship to the United States government that nonetheless brings her statements to "corporate" counsel for the government within the ambit of *Upjohn*. If the *Upjohn* privilege applies in the government context, Mrs. Clinton's statements concerning incidents involving herself and federal personnel occurring in the federal workplace are likely covered by the government's attorney-client privilege.<sup>116</sup>

*Upjohn* might initially appear to be a strong case for the White House, for it is well accepted that present management of the corporation "owns" the privilege and thus possesses the

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114. See *Upjohn Co. v. United States*, 449 U.S. 383, 391-97 (1980).

115. Cf. *Association of Am. Physicians and Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993) (finding Mrs. Clinton's health care task force covered by the Federal Advisory Committee Act (FACA)).

116. The status of Mrs. Clinton under *Upjohn* is not free from doubt, however. For the entity to be able to claim attorney-client privilege with respect to the communications of persons to its attorneys, *Upjohn* requires that the person have been communicating to counsel at the direction of her superiors, concerning matters "within the scope of [her] duties." 449 U.S. at 394. To the extent that Mrs. Clinton is a representative or agent of the United States government, she is President Clinton's constitutional subordinate. Her communications to White House Counsel were, at least impliedly, at President Clinton's direction. Mrs. Clinton's activities in connection with the handling of Rose Law Firm billing records certainly lie at the outer edge of plausible understanding of her "official" duties, but because they occurred on government property and involved government personnel acting "on duty" (including Mrs. Clinton, to whatever extent such a description applies to her), her actions would seem to fit within *Upjohn*'s description of the circumstances under which the privilege attaches.

prerogative to invoke or waive the privilege.<sup>117</sup> In the governmental context, President Clinton and subordinate executive branch officials subject to his direction and control constitute the present management of USA, Inc. And unlike executive privilege, which is subject to *Nixon's* balancing test, attorney-client privilege, *where it applies*, is absolute.<sup>118</sup> No showing of "compelling need" or other test of important justification trumps the privilege. Thus (the argument might go), if *Upjohn* applies to the federal government, the White House need not produce the notes (in the Hillary Clinton case) or the witness (in the Lindsey subpoena matter). Only if the requisites of the absolute privilege are not satisfied, or if the privilege has been waived, or if the communications are *prima facie* shown to have been made for the purpose of and in furtherance of the client's crime or fraud,<sup>119</sup> would the privilege not apply to defeat the subpoenas.

Each of these premises appears to be correct. But the conclusion is still wrong, because the argument fails to take into account an additional well-recognized "exception" to the privilege in the organizational client context: the so-called *Garner* doctrine, named for the leading Fifth Circuit decision in *Garner v. Wolfinbarger*.<sup>120</sup> As noted above, *Garner* addressed the problem that exists when a shareholder's derivative suit, brought (in theory) on behalf of the interests of the corporation, alleges a violation by present management of duties owed to the corporation as an entity.<sup>121</sup> What happens in such a situation when present management asserts the attorney-client privilege of the entity against another constituent of the entity,

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117. See *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348-49 (1984).

118. See *Swidler & Berlin v. United States*, 118 S.Ct. 2081, 2087 (1998) ("[W]e have rejected use of a balancing test in defining the contours of the privilege.") (citations omitted).

119. See, e.g., *United States v. Zolin*, 491 U.S. 554, 562-64 (1989); *In re Sealed Case*, 107 F.3d 46, 49-50 (D.C. Cir. 1997); *United States v. Hodge & Zweig*, 548 F.2d 1347, 1354-55 (9th Cir. 1977).

120. 430 F.2d 1093 (5th Cir. 1970). The *Garner* doctrine has been applied in a great many subsequent cases, by a large number of courts. See generally GEOFFREY C. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 774-76 (2d ed. 1994); 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* §1.13:107, at 397 (Supp. 1998); CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 6.5.5, at 288 (1986).

121. See *infra* notes 122-26 and accompanying text.

as a defense to discovery or testimony concerning certain communications or documents?

The Fifth Circuit, observing that "when all is said and done management is not managing for itself,"<sup>122</sup> held that the principles that govern assertion of the corporation's privilege as against corporate outsiders do not necessarily govern with respect to shareholders to whom management owes a fiduciary duty.<sup>123</sup> The court held that, while the corporation retained the privilege, the availability of the privilege to present management is "subject to the right of the stockholders to show cause why it should not be invoked in the particular instance."<sup>124</sup> The court then listed a number of factors relevant to the determination of whether "good cause" exists to bar management from asserting the privilege against shareholders also asserting the rights of the corporation:

[T]he bona fides of the shareholders; the nature of the shareholders' claim and whether it is obviously colorable; the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources; whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; whether the communication related to past or to prospective actions; whether the communication is of advice concerning the litigation itself; the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.<sup>125</sup>

The Fifth Circuit noted that traditional means of balancing such interests, including protective orders imposing confidentiality requirements on the shareholders, or in camera inspections, are available to trial judges considering such claims.<sup>126</sup>

The premise of the *Garner* doctrine is in many ways the same as that which undergirds *Upjohn* and the Supreme Court's subsequent decision in *Commodity Futures Trading Commission v. Weintraub*:<sup>127</sup> in the corporate context, the attorney-client privilege of the corporation belongs to the fictitious legal person, the corporation, not the corporate officials themselves. *Weintraub* held that a corporation's former man-

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122. *Garner*, 430 F.2d at 1101.

123. *See id.* at 1101-02.

124. *Id.* at 1103-04.

125. *Id.* at 1104.

126. *See id.*

127. 471 U.S. 343 (1985).

agement therefore may not assert the privilege against successor management; after all, the privilege belongs to the entity, and a different group of managers is now in charge of the entity.<sup>128</sup> *Garner's* rule, which pre-dated *Upjohn* and *Weintraub*, simply takes this premise to the next step: if the privilege belongs to the entity, it follows that the privilege may not rightfully be asserted by any *present* officer or individual acting on behalf of the entity, *against the interests of the entity itself*. Thus, a shareholder legitimately acting on behalf of the corporation may contest management's assertion of the privilege. Of course, the shareholders might not truly be representing the best interests of the corporation (thus the requirement of "good cause" and a list of factors relevant to this determination). With some oversimplification, the *Garner* factors are criteria for establishing that shareholders have made a plausible showing, predicated on allegations of management's violation of duties owed to the entity, that management's assertion of the privilege against the shareholders is not really in the best interests of the *entity*, but only in the self-interest of *management*.

The *Garner* doctrine is entirely distinct from the crime-fraud exception to the privilege (though they cover some of the same ground and thus might both be applicable in a given case).<sup>129</sup> The crime-fraud exception, where it applies, negates the *existence* of the privilege.<sup>130</sup> The *Garner* doctrine negates the exclusivity of present management's *control* of the privilege, as against other constituents of the entity who possess a legitimate claim to represent the interests of the entity.<sup>131</sup> As one leading scholarly treatment explains it, the crime-fraud exception "may be too narrow for the purposes envisioned by *Garner*, which seeks to ensure the attorney-client privilege is asserted in the best interests of the organization rather than for the benefit of management. *Garner* is concerned with bad faith in asserting the privilege, not bad faith in communicating with counsel for an illegal purpose."<sup>132</sup>

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128. See *id.*

129. See *Ward v. Succession of Freeman*, 854 F.2d 780 (5th Cir. 1988) (shareholders asserted both arguments unsuccessfully, in the alternative).

130. See *United States v. Zolin*, 491 U.S. 554, 566 (1989) (stating that there is no attorney-client privilege if the communication was made to enable anyone to commit a crime or fraud).

131. See *Garner*, 430 F.2d at 1103-04.

132. HAZARD ET AL., *supra* note 120, at 775.

The distinction can be critical: the *entity's* attorney-client privilege is not forfeited under the crime-fraud exception just because the *officer* communicating with counsel for the entity sought or made use of the legal advice for an illegal purpose.<sup>133</sup> Here is where the Eighth Circuit's awkward insight that "the White House" cannot commit a crime arguably comes in. An entity's attorney-client privilege is almost never lost because the officers who actually engaged in discussions with counsel did so for fraudulent or criminal purposes. The entity still possesses the privilege. It is up to present (or successor) management whether to waive the privilege (and hang the officer, so to speak) or to invoke it (to protect the officer). The decision to do the latter does not itself mean a crime or fraud is being committed by the entity, *but it may well constitute a situation in which those invoking the privilege are not acting in the best interests of the entity.*

The parallels between the policies justifying the *Garner* doctrine and the policies thought to justify the Independent Counsel arrangement are fairly stunning. If anything, it would seem that "Government *Garner*" in the context of an Independent Counsel investigation of members of present management of the United States government is even more clearly warranted than *Garner* itself, and should require less of a detailed instance-by-instance examination of "cause" than *Garner* requires in the derivative suit context. An Independent Counsel investigation is premised on the Attorney General's certification to a special judicial tribunal that there are grounds to believe that further investigation of the conduct of high executive branch officials and their associates is warranted. (It is almost as if present management, through an ombudsman's office, has itself authorized the derivative suit for an "accounting" by present management for its actions.) The Independent Counsel is

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133. See *In re Sealed Case*, 107 F.3d 46, 50 (D.C. Cir. 1997).

It was not enough for the government to show that the vice president committed a crime after he wrote his memorandum and attended the late August meeting with Company counsel. The holder of the privilege is the client and, in this case, the client was the Company, not the vice president. Unless the government made some showing that the Company intended to further and did commit a crime, the government could not invoke the crime-fraud exception to the privilege. . . . True enough, within weeks of the meeting about campaign finance law, the vice president violated that law. But the government had to demonstrate that the Company sought the legal advice with the intent to further its illegal conduct.

*Id.*

appointed by, his jurisdiction prescribed by, and his conduct supervised by, a special three-judge court. It would seem that, at least presumptively, the "good cause" requirement, which serves as a check against pure fishing expeditions by self-appointed (and possibly self-interested) shareholders, is already satisfied in large measure by the statutory procedures for appointment and supervision of the Independent Counsel.

It follows, I submit, that within the context of an Independent Counsel investigation of members of present management of the United States government, including the President, it should almost always be the case that the Independent Counsel—not the President—properly controls the decision of the United States whether to assert the attorney-client privilege of the United States as a limitation on the information available to a federal criminal investigation. Present management of the United States may not assert the governmental attorney-client privilege of the United States against a subpoena or other request for information submitted by a duly-appointed Independent Counsel acting within the scope of her jurisdiction on behalf of the United States.

Two caveats, implicit in the foregoing analysis, need to be added. First, nothing in the notion of "Government *Garner*" suggests that governmental attorney-client privilege does not *exist* or cannot be invoked against outsiders to the executive branch—such as Congress (since the relevant entity is the executive branch) or private litigants. Nor does the doctrine mean that control of the privilege is reassigned entirely into the hands of an Independent Counsel (such that he could waive the privilege and reveal such communications to Congress or others in a manner not consistent with existing statutory authorization);<sup>134</sup> appropriate protective orders, consistent with the statute setting up the Independent Counsel relationship, could be imposed. The Government *Garner* doctrine simply posits that the President and his subordinates may not invoke the attorney-client privilege of the United States as a prohibition on an Independent Counsel's access to information communicated to lawyers representing the United States.

This is a narrower, more precise—and, I submit, more sound—rule, limiting the *use* of the privilege, than the Eighth Circuit's articulation of the rule in *In re Grand Jury Subpoena Duces Tecum*. The D.C. Circuit's opinion in *In re Lindsey*, rec-

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134. See *supra* note 52.

ognizing (in part) the relevance of the corporate analogy and citing *Garner* in support of its holding, comes closer to the position advanced here. In the end, however, *In re Lindsey* rests on a balancing of factors as to whether the privilege should *exist* in a certain context, not on a bright-line legal rule as to how *control* of the privilege should be determined in intra-executive disputes between an Independent Counsel and the administration, in a post-*Morrison* constitutional world.

The second caveat is that nothing in Government *Garner* affects *executive* privilege—the qualified constitutional privilege, recognized in *United States v. Nixon*, covering executive branch deliberations generally. The analysis offered here only applies to governmental *attorney-client* privilege. Where some other privilege independently protects the confidentiality of the communications at issue, this analysis would not apply to such an independent claim. One could imagine a great many circumstances in which communications of government officers and employees to government counsel, for purposes of enabling the attorney to provide legal advice to the government, also satisfy *Nixon*'s presumptive constitutional privilege for executive branch deliberations. In such a case, the fact that the President could not invoke attorney-client privilege against the Independent Counsel would not necessarily preclude the President from prevailing in his argument for executive privilege under the *Nixon* framework.

### CONCLUSION

It might be objected that the limitation on the government's attorney-client privilege proposed here (or in the variants recognized by the Eighth Circuit and the D.C. Circuit) ultimately will prove harmful to the legitimate operation of government. The argument has lessened force, of course, in a case where a court, upon reviewing the materials *in camera*, has found that the *constitutional*, *executive* privilege recognized in *Nixon* does not justify nondisclosure of the information, or where the executive privilege claim is so weak on its face that it is not even attempted (or is attempted but quickly abandoned). One might disagree with the holding of *Nixon*, or think (as I do) that its balancing test was insufficiently weighted in favor of confidentiality, but that is not a reason to adopt a compensating unsound rule concerning attorney-client privilege. If *Nixon* is wrong on executive privilege, it should be overruled or modified, but not through the expedient of creating a stronger,



backdoor executive privilege applicable only when one or more of the officials deliberating happens to be a lawyer. The D.C. Circuit is right: there is no "lawyer exception" to *Nixon*, nor should there be.<sup>135</sup>

A different kind of objection is that it is absurd, practically and constitutionally, to sanction the equivalent of "derivative suits" against the President of the United States. But that is not an argument against the corporate privilege analogy developed here. It is an argument against the policy of the Independent Counsel statute, and against *Morrison v. Olson*. As with *Nixon*, one can disagree with *Morrison* (as I do). But the corrective is not to overrule it through the device of distortion of the attorney-client privilege; it is to recognize that *Morrison* is wrong as a matter of interpretation of Article II of the Constitution. And even that corrective will not change the fact that, from time to time, political realities will compel a President to appoint independent counsel where conduct of executive branch officials and associates is at issue.<sup>136</sup>

As long as *Nixon* and *Morrison* remain good law, the law of attorney-client privilege in the governmental context must accommodate the constitutional reality that the executive power of the United States—and thus control of the attorney-client privilege of the United States—is partially divested from the President of the United States. One needs new wineskins to hold the new wine. The Clinton era cases mark the initial judicial foray into this area, and are likely over time to be only the first of numerous cases to develop the law of attorney-client privilege in a post-*Morrison* world. Both courts' opinions bear the mark of cases that appear early on in legal thinking about an important issue, and that reflect some of the urgency of the moment. The Eighth Circuit was the first to consider the issue and its effort is understandably flawed and incomplete. The D.C. Circuit had the benefit of an earlier case and of arguments by counsel that had been revised and refined in light of that case, but had the drawbacks of enormous time pressure and great public consequences. Its analysis represents a refinement of the Eighth Circuit's, but the process of refinement

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135. *In re Lindsey*, 148 F.3d 1100, 1114 (D.C. Cir. 1998) (per curiam), cert. denied, 67 U.S.L.W. 3176 (U.S. Nov. 9, 1998) (No. 98-316).

136. See *Morrison v. Olson*, 487 U.S. 654, 711 (1988) (Scalia, J., dissenting) ("Political pressures produced special prosecutors—for Teapot Dome and for Watergate, for example—long before this statute created the independent counsel.").

plainly is not completed. The results in the Hillary Clinton White House notes litigation and the Lindsey subpoena litigation nonetheless are critical steps in the direction of a new understanding of governmental attorney-client privilege in an era of "divided management" of the executive power of the United States government.

